CUSTOMS BULLETIN AND DECISIONS

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 FEBRUARY 14, 1996 NO. 7

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 132

(T.D. 96–12)

RIN 1515–AB73

EXPORT CERTIFICATES FOR BEEF SUBJECT TO TARIFF-RATE QUOTA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, without change, the interim amendment to the Customs Regulations setting forth the form and manner by which an importer may make a declaration that a valid export certificate is in effect for imported beef which is the subject of a tariff-rate quota and the product of a participating country, as defined in regulations of the United States Trade Representative, in accordance with the Uruguay Round Agreements Act.

EFFECTIVE DATE: February 1, 1996.

FOR FURTHER INFORMATION CONTACT: Karen Cooper, Quota Branch, (202) 927–5401.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As a result of the Uruguay Round Agreements, approved by Congress in § 101 of the Uruguay Round Agreements Act (Pub. L. 103–465), the President, by Presidential Proclamation No. 6763, established a tariff-rate quota for imported beef.

The specific imported beef, as well as the various countries eligible for the in-quota tariff rate are set forth in Additional U.S. Note 3, Schedule XX, Chapter 2, of the Harmonized Tariff Schedule of the United States. The eligible countries which may export such beef to the United States and avail themselves of the preferential, in-quota tariff rate include Australia, New Zealand and Japan.

As part of the implementation of the tariff-rate quota for beef, the United States, specifically, the United States Trade Representative

(USTR), offered these exporting countries that have an allocation of the in-quota quantity the opportunity to use export certificates for their qualifying beef exports to the United States. Although countries that have an allocation of the in-quota quantity are referred to in the statutory law as "participating countries", for purposes of the interim rule and now for this final rule, a participating country constitutes an allocated country that has been authorized to participate in the export certificate program. To this end, New Zealand has requested the opportunity to participate in this program.

An exporting country using export certificates in this regard must notify the USTR and provide the necessary supporting information. Customs is then responsible for ensuring that no imports of beef from that country are counted against the country's in-quota allocation unless such beef is covered by a proper export certificate.

Accordingly, the USTR undertook rulemaking in this matter (15 CFR 2012.2 and 2012.3).

In addition, Customs issued an interim rule published in the Federal Register (60 FR 39108) on August 1, 1995, in order to set forth the form and manner by which an importer declares that a valid export certificate exists, including a unique number therefor which must be referenced on the entry, or withdrawal from warehouse, for consumption. This interim rule also included a record retention period for the certificate and required the submission of such certificate to Customs upon request.

No comments were received from the public in response to the invitation therefor set forth in the interim rule, and Customs has determined to adopt this rule as a final rule without change.

EXECUTIVE ORDER 12866 AND REGULATORY FLEXIBILITY ACT

Because this document involves a foreign affairs function of the United States and implements an international agreement, it is not subject to E.O. 12866. Because no notice of proposed rulemaking was required in this case, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 132

Customs duties and inspection, Imports, Postal service, Quotas.

AMENDMENT TO THE REGULATIONS

PART 132—QUOTAS

Accordingly, the interim rule amending 19 CFR part 132 to add a new § 132.15, which was published in the Federal Register at 60 FR 39108 on August 1, 1995, is adopted as a final rule without change.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: December 22, 1995.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 1, 1996 (61 FR 3569)]

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19 CFR Part 148

(T.D. 96–13)

CHANGES TO CUSTOMS LIST OF DESIGNATED PUBLIC INTERNATIONAL ORGANIZATIONS

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by updating Customs list of designated public international organizations entitled to certain free entry privileges provided for under provisions of the International Organizations Immunities Act. The last time the list was updated was in 1993 and since then the President has issued several Executive Orders which designate certain organizations as entitled to this free entry privilege. Accordingly, Customs deems it appropriate to update the list at this time.

EFFECTIVE DATE: February 1, 1996.

FOR FURTHER INFORMATION CONTACT: Dennis Sequeira, Director, International Organizations & Agreements Division, Office of International Affairs (202) 927–1480.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The International Organizations Immunities Act, 22 U.S.C. 288, generally provides that certain international organizations, agencies, and committees, those in which the United States participates or otherwise has an interest and which have been designated by the President

through appropriate Executive Order as public international organizations, are entitled to enjoy certain privileges, exemptions, and immunities conferred by the Act. The Department of State lists the public international organizations, designated by the President as entitled to enjoy any measure of the privileges, exemptions, and immunities conferred by the Act, in the notes following the provisions of Section 288.

One of the privileges provided for under the Act is that the baggage and effects of alien officers, employees, and representatives—and their families, suites, and servants—to the designated organization, are admitted free of duty and without entry. Those designated organizations entitled to this duty-free entry privilege are delineated at § 148.87(b), Customs Regulations (19 CFR 148.87(b)). Thus, the list of public international organizations maintained by Customs is for the limited purpose of identifying those organizations entitled to the duty-free entry privilege; it does not necessarily include all of the international organizations that are on the list maintained by the Department of State, which delineates all of the international organizations designated by the President regardless of the extent of the privileges conferred.

Since the last revision of § 148.87(b) in 1993 (T.D. 93–45), four Executive Orders have been issued designating certain organizations as public international organizations. Collectively, these Executive Orders add 7 international organizations to Customs list of public international organizations entitled to the duty-free entry privilege—bringing the total of designated international organizations to 68, as follows:

1. Executive Order 12842 of March 29, 1993, 58 FR 17081, 3 CFR 1993 Comp. p. 592, 29 Weekly Comp.Pres.Doc. 505, designated the International Development Law Institute;

2. Executive Order 12894 of January 26, 1994, 59 FR 4237, 3 CFR 1994 Comp. p. 857, 30 Weekly Comp.Pres.Doc. 159, designated the North Pacific Marine Science Organization;

3. Executive Order 12895 of January 26, 1994, 50 FR 4237, 3 CFR 1994 Comp. p. 857, 30 Weekly Comp.Pres.Doc. 159, designated the North Pacific Anadromous Fish Commission; and

4. Executive Order 12904 of March 16, 1994, 59 FR 13179, 3 CFR 1994 Comp. p. 880, 30 Weekly Comp.Pres.Doc. 550, designated the Commission for Environmental Cooperation, the Commission for Labor Cooperation, the Border Environment Cooperation Commission, and the North American Development Bank pursuant to the North American Free Trade Agreement Implementation Act.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Because this amendment merely corrects the listing of designated organizations entitled by law to free entry privileges as public international organizations, pursuant to 5 U.S.C. 553(b)(B), good cause exists for dispensing with notice and public procedure thereon as unneces-

sary. For the same reason, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Attorney, Regulations Branch, Office of Regulations and Rulings.

AMENDMENT TO THE REGULATIONS

For the reasons stated above, part 148, Customs Regulations (19 CFR part 148), is amended as set forth below:

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The general authority citation for part 148 is revised and the specific authority citation for § 148.87 continues to read as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 20, Harmonized Tariff Schedule of the United States);

* * * * * * *

2. Section 148.87(b) is amended by adding the following, in appropriate alphabetical order, to the table, to read as follows:

§ 148.87 Officers and employees of, and representatives to, public international organizations.

* * * * * * *

(b) * * *

Organization	*Executive Order*	*Date*
* * * * *	*	*
Border Environmental Cooperation Commission	12904	Mar. 16, 1994
* * * * *	*	*
Commission for Environmental Cooperation	12904	Mar. 16, 1994
* * * * *	*	*
Commission for Labor Cooperation	12904	Mar. 16, 1994
* * * * *	*	*
International Development Law Institute	12842	Mar. 29, 1993
* * * * *	*	*
North American Development Bank	12904	Mar. 16, 1994
* * * * *	*	*

Organization	Executive Order	Date
North Pacific Anadromous Fish Commission	12895	Jan. 26, 1994
* * * * * * *		
North Pacific Marine Science Organization	12894	Jan. 26, 1994
* * * * * * *		

GEORGE J. WEISE,
Commissioner of Customs.

Approved: December 22, 1995.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 1, 1996 (61 FR 3569)]

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19 CFR Parts 10, 113, 141, 144, and 181

(T.D. 96–14)

RIN 1515–AB87

NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)—IMPLEMENTATION OF DUTY-DEFERRAL PROGRAM PROVISIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; solicitation of comments.

SUMMARY: In response to comments received on the final rule implementing NAFTA, this document sets forth interim regulations establishing procedural and other requirements that apply to the collection, waiver and reduction of duties under the duty-deferral program provisions of the North American Free Trade Agreement (NAFTA). The document prescribes the documentary and other requirements that must be followed when merchandise is withdrawn from a U.S. duty-deferral program either for exportation to another NAFTA country or for entry into a duty-deferral program of another NAFTA country, the procedures that must be followed in filing a claim for a waiver or reduction of duties collected on such merchandise, and the procedures for finalization of duty collections and duty waiver or reduction claims.

DATES: Interim rule effective January 1, 1996; comments must be submitted April 1, 1996.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of

Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Angela Downey, Office of Field Operations (202–927–1082).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 6, 1995, Customs published in the Federal Register (60 FR 46334) a document which adopted, as a final rule, interim regulations implementing the Customs-related provisions of the North American Free Trade Agreement (NAFTA) which was adopted by the United States with the enactment of the North American Free Trade Agreement Implementation Act (the "Act"), Pub. L. 103–182, 107 Stat. 2057. The majority of the NAFTA implementing regulations are set forth in Part 181 of the Customs Regulations (19 CFR Part 181) which includes, in Subpart E, regulations implementing the NAFTA drawback (including duty-deferral) provisions of Article 303 of the NAFTA and section 203 of the Act which apply to goods imported into the United States and then subsequently exported from the United States to Canada on or after January 1, 1996, or to Mexico on or after January 1, 2001.

Within Subpart E of Part 181, § 181.53 specifically addresses the provisions concerning the collection, and waiver or reduction, of duty on goods imported into the United States pursuant to a duty-deferral program (that is, imported into a manipulation warehouse, manufacturing warehouse, smelting or refining warehouse or foreign trade zone, or imported under a temporary importation bond) and subsequently exported, or used as a material in the production of another good that is exported, to Canada or Mexico. Paragraph (a)(1) defines the term "duty-deferral program" for purposes of the section. Paragraph (a)(2) provides that the exported good shall be treated as if it had been entered or withdrawn for consumption and thus subject to duty. Paragraph (a)(3) states that Customs shall waive or reduce, in accordance with paragraphs (b) through (f), the duties paid or owed under paragraph (a)(2) provided that evidence of exportation and satisfactory evidence of duties paid in Canada or Mexico are submitted within 60 calendar days of the date of exportation. Paragraphs (b) through (f) set forth the duty assessment and waiver or reduction rules with reference to each type of duty-deferral program, and each of these paragraphs provides that the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable under the section or the total amount of customs duties paid to Canada or Mexico.

In the discussion of public comments submitted on the interim NAFTA implementing regulations, the September 6, 1995, final rule document noted that a number of commenters raised questions regarding the procedures, including documentary requirements, that would apply for purposes of the collection and waiver or reduction of duty under § 181.53. In responding to these comments, Customs agreed that

the regulations should specifically address such procedural issues. Customs further stated that it would be preferable to address these issues in a separate Federal Register document, with a view to having appropriate regulations in place on January 1, 1996, when the Subpart E regulations go into effect (that is, with regard to goods exported to or entered into a duty-deferral program in Canada). The regulatory amendments set forth in this document are intended to accomplish that purpose.

DISCUSSION OF AMENDMENTS

Section 10.31:

In § 10.31, which concerns temporary importations under bond, paragraph (h) is amended by adding at the end a new sentence regarding merchandise imported under subheading 9813.00.05, HTSUS, that is exported to Canada or Mexico, because the entry and bond requirements under amended § 181.53 may apply to such merchandise.

Section 113.62:

In § 113.62, which sets forth the basic importation and entry bond conditions, paragraphs (a) and (b) are amended by the addition of references to the withdrawal of merchandise from a duty-deferral program either for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico because such transactions will involve the filing of an entry under amended § 181.53 as discussed below. Paragraph (a) concerns the agreement to pay duties, taxes and fees, and paragraph (b) concerns the agreement to make or complete entry.

Section 141.0a:

The definition of "entry" in paragraph (a) and the definition of "entered for consumption" in paragraph (f) have been expanded by the addition of a sentence at the end referring to documentation required under amended § 181.53 as discussed below.

Section 141.68:

A new paragraph (i) has been added to § 141.68 (time of entry) regarding merchandise covered by the entry procedures contained in amended § 181.53 as discussed below.

Section 144.38:

In § 144.38, which concerns withdrawals for consumption, a new paragraph (b) has been added to cover withdrawals either for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico.

Section 181.53:

Section 181.53 is retitled to reflect that the section also covers collection (rather than only waiver or reduction) of duty, and the section text is extensively revised in order to accommodate the necessary documentation and other procedural requirements regarding the collection and waiver or reduction of duty under the NAFTA duty-deferral provisions.

In addition to editorial, nonsubstantive changes to enhance the clarity of the text, the revised text incorporates a number of organizational and substantive changes that are outlined below.

Paragraph (a)(1) is retitled as a definitions paragraph and a new definition of "date of exportation" has been added as subparagraph (i) thereof.

Paragraph (a)(2) still concerns the "treatment as entered or withdrawn for consumption" principle but is divided into the following subparagraphs:

1. Subparagraph (i) incorporates the provisions of former paragraph (a)(2) and also includes two new principles stating that the documentation required to be filed under the section shall constitute an entry or withdrawal for consumption for purposes of the Customs Regulations and that any assessment of duty under this section shall include the duties and fees referred to in §§ 181.42(a)–(c) (that is, antidumping and countervailing duties, premiums on quota, tariff rate quota or tariff preference level goods, and fees under section 22 of the Agricultural Adjustment Act) and the fees provided for in § 24.23 (that is, fees for processing merchandise). Subparagraph (i) refers to goods withdrawn for exportation to Canada or Mexico (subparagraph (i)(A)) and goods withdrawn and entered into a duty-deferral program in Canada or Mexico (subparagraph (i)(B)) because Canada, Mexico and the United States (the three NAFTA Parties) agreed that goods withdrawn from a duty-deferral program in one NAFTA country and entered into a duty-deferral program in another NAFTA country shall be deemed not to have been exported (see) Section F, Article X of the "Regulatory Standards for Implementation of the North American Free Trade Agreement" published in the Federal Register on September 6, 1995, at 60 FR 46464).

2. Subparagraph (ii) is new and provides for application of the bond provisions of § 142.4 to each withdrawal and exportation transaction under § 181.53.

3. Subparagraph (iii) is a new provision covering documentation filing and duty payment procedures. Subparagraph (A) thereunder specifies the persons who must file the documentation required under the section. Subparagraph (B) provides for the filing of a Customs Form 7501 within 10 working days of the date of exportation or within 10 working days after being entered into a duty-deferral program in Canada or Mexico. Subparagraph (C) concerns duty payment and requires that the duty be deposited with Customs at any time prior to, but no later than, 60 calendar days after the date of exportation of the good or 60 calendar days after the date the good is entered into a duty-deferral program in Canada or Mexico, and subparagraph (C) also provides for the calculation of interest from the applicable 60th calendar day.

Paragraph (a)(3) is retitled "waiver or reduction of duties" and is divided into the following subparagraphs:

1. Subparagraph (i) incorporates the provisions of former paragraph (a)(3) but also includes two new substantive provisions. The first of these new provisions consists of an exception clause at the beginning of the subparagraph regarding duties and fees referred to in §§ 181.42(a)–(c) and fees provided for in § 24.23, because such duties and fees may not be waived or reduced under the NAFTA drawback (including duty-deferral) provisions. The second of these new substantive provisions requires the filing of a "claim" for waiver or reduction of duties and states that the claim shall be "based on" evidence of exportation to Canada or Mexico or of entry into a duty-deferral program in Canada or Mexico and satisfactory evidence of duties paid in Canada or Mexico. The "based on" provision replaces the former requirement of submission of such evidence, is modeled on the approach used for NAFTA preferential duty claims (see § 181.21(a) of the NAFTA regulations), and is intended to reduce the paperwork burden and to facilitate electronic filings.

2. Subparagraph (ii) is a new provision covering the procedures for filing claims and paying reduced duties. This subparagraph requires that the claim be filed on Customs Form 7501 which must include specified Canadian or Mexican import information and provides that any reduced duties must be deposited with Customs when a claim for reduced duties is filed.

3. Subparagraph (iii) is a new provision which provides for the filing of a drawback claim if goods entered into a Canadian or Mexican duty-deferral program are subsequently withdrawn from that duty-deferral program.

Paragraph (a)(4) is a new provision setting forth procedures regarding the liquidation of entries filed under § 181.53 both if no claim for waiver or reduction of duties is filed (subparagraph (i)) and if a claim is filed (subparagraph (ii)). This paragraph generally reflects existing statutory and regulatory standards regarding liquidations, including notices of liquidation, deemed liquidations, and the time for filing protests after liquidation. In addition, in cases in which a claim is filed, this paragraph provides for an automatic 3-year extension of liquidation, because Customs will require additional time to obtain any information from Canadian or Mexican customs necessary to verify a claim (see § 181.50(b) which provides for a 3-year delay in liquidation of drawback claims).

Former paragraphs (b) through (f) are redesignated as subparagraphs (1) through (5) under a new paragraph (b) titled "assessment and waiver or reduction of duty". The introductory texts and/or examples in newly designated paragraphs (b)(1)–(5), each of which still deals with a separate type of duty-deferral program, have been modified as follows: (1) by replacing the references to evidence of exportation and payment of duty by references to the filing of a proper claim under para-

graph (a)(3) of the section; (2) to refer, where appropriate, to the filing of Customs Form 7501; and (3) by revising the examples to more accurately reflect a NAFTA duty-deferral context. In addition, the example concerning manipulation in warehouse (former paragraph (b), now paragraph (b)(1)) has been removed because it no longer reflects current law as interpreted by the courts (see *Tropicana Products Inc. v. U.S.*, 789 F.Supp. 1154, 16 CIT 155 (1992)). Finally, an exception regarding a good imported from Canada or Mexico for repair or alteration has been added at the beginning of the text covering temporary importation under bond (former paragraph (f), now paragraph (b)(5)), in order to reflect the terms of Article 307(2) of the NAFTA.

Paragraph (c) concerns recordkeeping and corresponds to former paragraph (g) but includes a new requirement that evidence of exportation or of entry into a Canadian or Mexican duty-deferral program and payment of Canadian or Mexican duty be maintained by the person who files a claim for waiver or reduction of duty under the section.

Paragraph (d) corresponds to former paragraph (h) and differs from the former text in referring to a failure to file a proper claim (rather than to a failure to provide evidence of duties paid or owed to Canada or Mexico) and also in referring more specifically to the persons who are liable for the payment of full duties.

Finally, paragraph (e) corresponds to former paragraph (i) but has been modified to refer to reliquidation of the "entry filed under this section pursuant to 19 U.S.C. 1508(b)(2)(B)(iii) even after liquidation of the entry has become final" (see § 181.50(b)).

COMMENTS

Before adopting these interim regulations as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Pursuant to the provisions of 5 U.S.C. 553(a), public notice is inapplicable to these interim regulations because they are within the foreign affairs function of the United States. The United States is obligated under Chapter Three of the NAFTA to implement the NAFTA duty-deferral provisions with respect to exportation to Canada on January 1, 1996. Furthermore, for the same reason, it is determined that good cause exists under the provisions of 5 U.S.C. 553(d)(3) for dispensing with a delayed effective date.

EXECUTIVE ORDER 12866

Because this document involves a foreign affairs function of the United States and implements an international agreement, it is not subject to the provisions of E.O. 12866.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

PAPERWORK REDUCTION ACT

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in these regulations have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1515–0208.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information in these regulations is in § 181.53. This information is required in connection with the withdrawal of goods from U.S. duty deferral programs for export to Canada or Mexico and will be used by the U.S. Customs Service both to determine the amount of duty to be collected on the exported goods and to determine eligibility for a waiver or reduction of such duty. The likely respondents are business organizations including importers, exporters and manufacturers.

Estimated total annual reporting and/or recordkeeping burden: 405,070 hours.

Estimated average annual burden per respondent/recordkeeper: 227 hours.

Estimated number of respondents and/or recordkeepers: 1783.

Estimated annual frequency of responses: 1,069,800.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, DC 20229.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 10

Alterations, Bonds, Customs duties and inspection, Exports, Imports, Preference programs, Repairs, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 113

Air carriers, Bonds, Customs duties and inspection, Exports, Foreign commerce and trade statistics, Freight, Imports, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 141

Bonds, Customs duties and inspection, Entry of merchandise, Invoices, Powers of attorney, Packaging, Release of merchandise, Reporting and recordkeeping requirements.

19 CFR Part 144

Bonds, Customs duties and inspection, Reporting and recordkeeping requirements, Warehouses.

19 CFR Part 181

Administrative practice and procedure, Canada, Customs duties and inspection, Exports, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements (North American Free-Trade Agreement).

AMENDMENTS TO THE REGULATIONS

Accordingly, Parts 10, 113, 141, 144 and 181, Customs Regulations (19 CFR Parts 10, 113, 141, 144 and 181), are amended as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * * * *

2. In § 10.31, paragraph (h) is amended by adding a new sentence at the end to read as follows:

§ 10.31 Entry; bond.

* * * * * * *

(h) * * * However, a TIB importer may be required to file an entry for consumption and pay duties, or pay liquidated damages under its bond

for a failure to do so, in the case of merchandise imported under subheading 9813.00.05, HTSUS, and subsequently exported to Canada or Mexico (see § 181.53 of this chapter).

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * * * *

2. In § 113.62, the introductory texts of paragraphs (a)(1) and (b) are revised to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * * * *

(a) *Agreement to Pay Duties, Taxes, and Charges.*

(1) If merchandise is imported and released from Customs custody or withdrawn from a Customs bonded warehouse into the commerce of, or for consumption in, the United States, or under § 181.53 of this chapter is withdrawn from a duty-deferral program for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico, the obligors (principal and surety, jointly and severally) agree to:

* * * * * * *

(b) *Agreement to Make or Complete Entry.* If all or part of imported merchandise is released before entry under the provisions of the special delivery permit procedures under 19 U.S.C. 1448(b), or released before the completion of the entry under 19 U.S.C. 1484(a), or withdrawn from a duty-deferral program for either exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico before the filing of the documentation provided for in § 181.53(a)(2) of this chapter, the principal agrees to file within the time and in the manner prescribed by law and regulation, documentation to enable Customs to:

* * * * * * *

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Section 141.68 also issued under 19 U.S.C. 1315;

* * * * * * *

2. In § 141.0a, paragraphs (a) and (f) are amended by adding a sentence at the end to read as follows:

§ 141.0a Definitions.

* * * * * * *

(a) *Entry.* * * * "Entry" also means that documentation required by § 181.53 of this chapter to be filed with Customs to withdraw merchandise from a duty-deferral program in the United States for exportation

to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico.

* * * * * * *

(f) *Entered for consumption.* * * * "Entered for consumption" also means the necessary documentation has been filed with Customs to withdraw merchandise from a duty-deferral program in the United States for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico (see § 181.53 of this chapter).

* * * * * * *

3. Section 141.68 is amended by adding a new paragraph (i) to read as follows:

§ 141.68 Time of entry.

* * * * * * *

(i) *Exportation to Canada or Mexico of goods imported into the United States under a duty-deferral program defined in § 181.53 of this chapter.* When merchandise in a U.S. duty-deferral program is withdrawn for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico, the date of entry is the date the entry is required to be filed under § 181.53(a)(2)(iii) of this chapter.

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The authority citation for Part 144 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1624.

* * * * * * *

2. Section 144.38 is amended by adding a new paragraph (b) to read as follows:

§ 144.38 Withdrawal for consumption.

* * * * * * *

(b) *Withdrawal for exportation to Canada or Mexico.* A withdrawal for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico is considered a withdrawal for consumption pursuant to § 181.53 of this chapter.

* * * * * * *

PART 181—NORTH AMERICAN FREE TRADE AGREEMENT

1. The authority citation for Part 181 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonizd Tariff Schedule of the United States, 1624, 3314.

2. Section 181.53 is revised to read as follows:

§ 181.53 Collection and waiver or reduction of duty under duty-deferral programs.

(a) *General.*

(1) *Definitions.* The following definitions shall apply for purposes of this section:

(i) *Date of exportation.* "Date of exportation" means the date of importation into Canada or Mexico as reflected on the applicable Canadian or Mexican entry document (see § 181.47(c)(1) and (2).)

(ii) *Duty-deferral program.* A "duty-deferral program" means any measure which postpones duty payment upon arrival of a good in the United States until withdrawn or removed for exportation to Canada or Mexico or for entry into a Canadian or Mexican duty-deferral program. Such measures govern manipulation warehouses, manufacturing warehouses, smelting and refining warehouses, foreign trade zones, and those temporary importations under bond that are specified in paragraph (b)(5) of this section.

(2) *Treatment as entered or withdrawn for consumption.*

(i) *General.*

(A) Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico or is used as a material in the production of another good that is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. 3333 and is not described in § 181.45 of this part, the documentation required to be filed under this section in connection with the exportation of the good shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and the exported good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

(B) Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program and entered into a duty-deferral program in Canada or Mexico or is used as a material in the production of another good that is subsequently withdrawn from the duty-deferral program and entered into a duty-deferral program in Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. 3333 and is not described in § 181.45, the documentation required to be filed under this section in connection with the withdrawal of the good from the U.S. duty-deferral program shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and the withdrawn good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

(C) Any assessment of duty under this section shall include the duties and fees referred to in § 181.42(a) through (c) and the fees provided for in § 24.23 of this chapter; these inclusions shall not be subject to refund, waiver, reduction or drawback.

(ii) *Bond requirements.* The provisions of § 142.4 of this chapter shall apply to each withdrawal and exportation transaction described in paragraph (a)(2)(i) of this section. However, in applying the provisions of § 142.4 of this chapter in the context of this section, any reference to

release from Customs custody in § 142.4 of this chapter shall be taken to mean exportation to Canada or Mexico.

(iii) *Documentation filing and duty payment procedures.*

(A) *Persons required to file.* In the circumstances described in paragraph (a)(2)(i) of this section, the documentation described in paragraph (a)(2)(iii)(B) of this section must be filed by one of the following persons:

(1) In the case of a withdrawal of the goods from a warehouse, the person who has the right to withdraw the goods;

(2) In the case of a temporary importation under bond (TIB) specified in paragraph (b)(5) of this section, the TIB importer whether or not he sells the goods for export to Canada or Mexico unless § 10.31(h) of this chapter applies; or

(3) In the case of a withdrawal from a foreign trade zone, the person who has the right to make entry. However, if a zone operator is not the person with the right to make entry of the good, the zone operator shall be responsible for the payment of any duty due in the event the zone operator permits such other person to remove the goods from the zone and such other person fails to comply with §§ 146.67 and 146.68 of this chapter.

(B) *Documentation required to be filed and required filing date.* The person required to file shall file Customs Form 7501 no later than 10 working days after the date of exportation to Canada or Mexico or 10 working days after being entered into a duty-deferral program in Canada or Mexico. Except where the context otherwise requires and except as otherwise specifically provided in this paragraph, the procedures for completing and filing Customs Form 7501 in connection with the entry of merchandise under this chapter shall apply for purposes of this paragraph. For purposes of completing Customs Form 7501 under this paragraph, any reference on the form to the entry date shall be taken to refer to the date of exportation of the good or the date the goods are entered into a duty-deferral program in Canada or Mexico. The Customs Form 7501 required under this paragraph may be transmitted electronically.

(C) *Duty payment.* The duty estimated to be due under paragraph (b) of this section shall be deposited with Customs 60 calendar days after the date of exportation of the good. If a good is entered into a duty-deferral program in Canada or Mexico, the duty estimated to be due under paragraph (b) of this section, but without any waiver or reduction provided for in that paragraph, shall be deposited with Customs 60 calendar days after the date the good is entered into such duty-deferral program. Nothing shall preclude the deposit of such estimated duty at the time of filing the Customs Form 7501 under paragraph (a)(2)(iii)(B) of this section or at any other time within the 60-day period prescribed in this paragraph. However, any interest calculation shall run from the date the duties are required to be deposited.

(3) *Waiver or reduction of duties.*

(i) *General.* Except in the case of duties and fees referred to in §§ 181.42(a) through (c) and fees provided for in § 24.23 of this chapter, Customs shall waive or reduce the duties paid or owed under paragraph (a)(2) of this section by the person who is required to file the Customs Form 7501 (see paragraph (a)(2)(iii)(A) of this section) in accordance with paragraph (b) of this section, provided that a claim for waiver or reduction of the duties is filed with Customs within the appropriate 60-day time frame. The claim shall be based on evidence of exportation or entry into a Canadian or Mexican duty-deferral program and satisfactory evidence of duties paid in Canada or Mexico (see § 181.47(c).)

(ii) *Filing of claim and payment of reduced duties.* A claim for a waiver or reduction of duties under paragraph (a)(3)(i) of this section shall be made on Customs Form 7501 which shall set forth, in addition to the information required under paragraph (a)(2)(iii)(B) of this section, a description of the good exported to Canada or Mexico and the Canadian or Mexican import entry number, date of importation, tariff classification number, rate of duty and amount of duty paid. If a claim for reduction of duties is filed under this paragraph, the reduced duties shall be deposited with Customs when the claim is filed.

(iii) *Drawback on goods entered into a duty-deferral program in Canada or Mexico.* After goods in a duty-deferral program in the United States which have been sent from the United States and entered into a duty-deferral program in Canada or Mexico are then withdrawn from that Canadian or Mexican duty-deferral program either for entry into Canada or Mexico or for export to a non-NAFTA country, the person who filed the Customs Form 7501 (see paragraph (a)(2)(iii)(A) of this section) may file a claim for drawback if the goods are withdrawn within 5 years from the date of the original importation of the god into the United States. If the goods are entered for consumption in Canada or Mexico, drawback will be calculated in accordance with § 181.44 of this part.

(4) *Liquidation of entry.*

(i) *If no claim is filed.* If no claim for a waiver or reduction of duties is filed in accordance with paragraph (a)(3) of this section, Customs shall determine the final duties due under paragraph (a)(2)(i) of this section and shall post a bulletin notice of liquidation of the entry filed under this section in accordance with § 159.9 of this chapter. Where no claim was filed in accordance with this section and Customs fails to liquidate, or extend liquidation of, the entry filed under this section within 1 year from the date of the entry, upon the date of expiration of that 1–year period the entry shall be deemed liquidated by operation of law in the amount asserted by the exporter on the Customs Form 7501 filed under paragraph (a)(2)(iii)(A) of this section. A protest under section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this

chapter shall be filed within 90 days from the date of posting of the notice of liquidation under this section.

(ii) *If a claim is filed.* If a claim for a waiver or reduction of duties is filed in accordance with paragraph (a)(3) of this section, an extension of liquidation of the entry filed under this section shall take effect for a period not to exceed 3 years from the date the entry was filed. Before the close of the extension period, Customs shall liquidate the entry filed under this section and shall post a bulletin notice of liquidation in accordance with § 159.9 of this chapter. If Customs fails to liquidate the entry filed under this section within 4 years from the date of the entry, upon the date of expiration of that 4-year period the entry shall be deemed liquidated by operation of law in the amount asserted by the exporter on the Customs Form 7501 filed under paragraph (a)(3)(ii) of this section. A protest under section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter shall be filed within 90 days from the date of posting of the notice of liquidation under this section.

(b) *Assessment and waiver or reduction of duty.*

(1) *Manipulation in warehouse.* Where a good subject to NAFTA drawback under this subpart is withdrawn from a bonded warehouse (19 U.S.C. 1562) after manipulation for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico, duty shall be assessed on the good in its condition and quantity, and at its weight, at the time of such withdrawal from the warehouse and with such additions to, or deductions from, the final appraised value as may be necessary by reason of its change in condition. Such duty shall be paid no later than 60 calendar days after the date of exportation or of entry into the duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

(2) *Bonded manufacturing warehouse.* Where a good is manufactured in a bonded warehouse (19 U.S.C. 1311) with imported materials and is then withdrawn for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico, duty shall be assessed on the materials in their condition and quantity, and at their weight, at the time of their importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the materials under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company N imports tea into the United States and makes a Class 6 warehouse entry. Company N manufactures sweetened ice tea mix by combining the imported tea with refined cane sugar and other

flavorings and packaging it in retail size canisters. Upon withdrawal of the ice tea mix from the warehouse for exportation to Canada, a Customs Form 7501 is filed showing $900 in estimated U.S. duties on the basis of the unmanufactured tea. Upon entry into Canada, the equivalent of US$800 is assessed on the exported ice tea mix. Company N submits to Customs a proper claim under paragraph (a)(3) of this section showing payment of the US$800 equivalent in duties to Canada. Company N will only be required to pay $100 in U.S. duties out of the $900 amount reflected on the Customs Form 7501.

(3) *Bonded smelting or refining warehouse.* For any qualifying imported metal-bearing materials (19 U.S.C. 1312), duty shall be assessed on the imported materials and the charges against the bond canceled no later than 60 calendar days after either the date of exportation of the treated materials to Canada or Mexico or the date of entry of the treated materials into a duty deferral program of Canada or Mexico, either from the bonded smelting or refining warehouse or from such other customs bonded warehouse after the transfer of the same quantity of material from a bonded smelting or refining warehouse. However, upon filing of a proper claim under paragraph (a)(3) of this section, the duty on the imported materials shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the imported materials under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company Z imports 47 million pounds of electrolytic zinc which is entered into a bonded smelting and refining warehouse (Class 7) for processing. Thereafter, Company Z withdraws the merchandise for exportation to Canada and files a Customs Form 7501 showing $90,000 in estimated U.S. duty on the dutiable quantity of metal contained in the imported metal-bearing materials. Upon entry of the processed zinc into Canada, the equivalent of US$50,000 in duties are assessed. Within 60 days of exportation Company Z files a proper claim under paragraph (a)(3) of this section and Customs liquidates the entry with duty due in the amount of $40,000.

(4) *Foreign trade zone.* For a good that is manufactured or otherwise changed in condition in a foreign trade zone (19 U.S.C. 81c(a)) and then withdrawn from the zone for exportation to Canada or Mexico or for entry into a Canadian or Mexican duty-deferral program, the duty assessed, as calculated under paragraph (e)(1) or (e)(2) of this section, shall be paid no later than 60 calendar days after either the date of exportation of the good to Canada or Mexico or the date of entry of the good into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

(i) *Nonprivileged foreign status.* In the case of a nonprivileged foreign status good, duty is assessed on the good in its condition and quantity,

and at its weight, at the time of its exportation from the zone to Canada or Mexico or its entry into a duty-deferral program of Canada or Mexico.

Example. CMG imports $1,000,000 worth of auto parts from Korea and admits them into Foreign-Trade Subzone number 00, claiming nonprivileged foreign status. (If the auto parts had been regularly entered they would have been dutiable at 4 percent, or $40,000.) CMG manufactures subcompact automobiles. Automobiles are dutiable at 2.5 percent ($25,000) if entered for consumption in the United States. CMG withdraws the automobiles from the zone and exports them to Mexico. Upon entry of the automobiles in Mexico, CMG pays the equivalent of US$20,000 in duty. Before the expiration of 60 calendar days from the date of exportation, CMG files a proper claim under paragraph (a)(3) of this section and pays $5,000 in duty to Customs representing the difference between the $25,000 which would have been paid if the automobiles had been entered for consumption from the zone and the US$20,000 equivalent paid to Mexico.

(ii) *Privileged foreign status.* In the case of a privileged foreign status good, duty is assessed on the good in its condition and quantity, and at its weight, at the time privileged status is granted in the zone.

Example. O&G, Inc. admits Kuwaiti crude petroleum into its zone and requests, one month later, privileged foreign status on the crude before refining the crude into motor gasoline and kerosene. Upon withdrawal of the refined goods from the zone by O&G, Inc. for exportation to Canada, a Customs Form 7501 is filed showing $700 in estimated duties on the imported crude petroleum (rather than on the refined goods which would have been assessed $1,200). D&O is the consignee in Canada and pays the Canadian customs duty assessment of the equivalent of US$1,500 on the goods. O&G, Inc. is entitled to a waiver of the full $700 in duties upon filing of a proper claim under paragraph (a)(3) of this section.

(5) *Temporary importation under bond.* Except in the case of a good imported from Canada or Mexico for repair or alteration, where a good, regardless of its origin, was imported temporarily free of duty for repair, alteration or processing (subheading 9813.00.05, Harmonized Tariff Schedule of the United States) and is subsequently exported to Canada or Mexico, duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company A imports glassware under subheading 9813.00.05, HTSUS. The glassware is from France and would be duti-

able under a regular consumption entry at $6,000. Company A alters the glassware by etching hotel logos on the glassware. Two weeks later, Company A sells the glassware to Company B, a Mexican company, and ships the glassware to Mexico. Company B enters the glassware and is assessed duties in an amount equivalent to US$6,200 and claims NAFTA preferential tariff treatment. Company B provides a copy of the Mexican landing certificate to Company A showing that the US$6,200 equivalent in duties was assessed but not yet paid to Mexico. If Mexico ultimately denies Company B's NAFTA claim and the Mexican duty payment becomes final, Company A, upon submission to Customs of a proper claim under paragraph (a)(3) of this section, is entitled to a waiver of the full $6,000 in U.S. duty.

(c) *Recordkeeping requirements.* If a person intends to claim a waiver or reduction of duty on goods under this section, that person shall maintain records concerning the value of all involved goods or materials at the time of their importation into the United States and concerning the value of the goods at the time of their exportation to Canada or Mexico or entry into a duty-deferral program of Canada or Mexico, and if a person files a claim under this section for a waiver or reduction of duty on goods exported to Canada or Mexico or entered into a Canadian or Mexican duty-deferral program, that person shall maintain evidence of exportation or entry into a Canadian or Mexican duty-deferral program and satisfactory evidence of the amount of any customs duties paid to Canada or Mexico on the good (see § 181.47(c).) Failure to maintain adequate records will result in denial of the claim for waiver or reduction of duty.

(d) *Failure to file proper claim.* If the person identified in paragraph (a)(2)(iii)(A) of this section fails to file a proper claim within the 60–day period specified in this section, that person, or the FTZ operator pursuant to paragraph (a)(2)(iii)(A)(*3*) of this section, will be liable for payment of the full duties assessed under this section and without any waiver or reduction thereof.

(e) *Subsequent claims for preferential tariff treatment.* If a claim for a refund of duties is allowed by the Canadian or Mexican customs administration under Article 502(3) of the NAFTA or under any other circumstance after duties have been waived or reduced under this section, Customs may reliquidate the entry filed under this section pursuant to 19 U.S.C. 1508(b)(2)(B)(iii) even after liquidation of the entry has become final.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: January 24, 1996.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, January 30, 1996 (61 FR 2908)]

19 CFR Part 4

RIN 1515-AB31

(T.D. 93-96)

REPORTING REQUIREMENTS FOR VESSELS, VEHICLES, AND INDIVIDUALS; CORRECTION

AGENCY: Customs Service, Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final regulations (T.D. 93-96), which were published on Tuesday, December 21, 1993 (58 FR 67312). The regulations related to the reporting requirements for vessels, vehicles, and individuals.

EFFECTIVE DATE: February 1, 1996.

FOR FURTHER INFORMATION CONTACT: Larry L. Burton, Attorney, Entry and Carrier Rulings Branch (202) 482-6933.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On Tuesday, December 21, 1993, Customs published a document in the Federal Register (T.D. 93-96, 58 FR 67312), that amended the Customs Regulations to implement certain provisions of the Customs Enforcement Act of 1986, a part of the Anti-Drug Abuse Act of 1986, designed to strengthen Federal efforts to improve the enforcement of Federal drug laws and enhance the interdiction of illegal drug shipments. The regulatory changes pertained to the arrival, entry, and departure reporting requirements applicable to vessels, vehicles, and individuals, and informed the public regarding applicable penalty, seizure and forfeiture provisions for violation of the provisions.

As set forth in the Federal Register, the document contained an error in an amendatory instruction resulting in the inadvertent removal of two paragraphs from § 4.30(a). At the time the document was published, § 4.30(a) consisted of three paragraphs: introductory paragraph (a), paragraph (a)(1), and paragraph (a)(2). The amendatory instruction which was in error stated that paragraph (a) was being revised, rather than stating that introductory paragraph (a) was being revised. Because only the text of introductory paragraph (a) followed that instruction, paragraphs (a)(1) and (a)(2) were deleted from future editions of the Customs Regulations (19 CFR). The intent of Customs was to revise the language of introductory paragraph (a), but to retain paragraphs (a)(1) and (a)(2). This document corrects that error by reinserting those two paragraphs.

LIST OF SUBJECTS IN 19 CFR PART 4

Cargo vessels, Coastal zone, Customs duties and inspection, Fishing vessels, Harbors, Imports, Maritime carriers, Passenger vessels, Reporting and recordkeeping requirements, Seamen, Vessels, Yachts.

AMENDMENTS TO THE REGULATIONS

Accordingly, Title 19, Chapter I, part 4 of the Customs Regulations (19 CFR part 4) is corrected by making the following amendments:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 and the specific authority citation for § 4.30 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C.App. 3, 91;

* * * * * * *

Section 4.30 also issued under 19 U.S.C. 288, 1433, 1446, 1448, 1450–1454, 1490;

* * * * * * *

2. Section 4.30(a) is amended by adding paragraphs (a)(1) and (a)(2) to read as follows:

§ 4.30 Permits and special licenses for unlading and lading.

(a) * * *

(1) U.S. and foreign vessels arriving at a U.S. port directly from a foreign port or place are required to make entry, whether it be formal or, as provided in § 4.8, preliminary, before the port director may issue a permit or special license to lade or unlade.

(2) U.S. vessels arriving at a U.S. port from another U.S. port at which formal entry was made may be issued a permit or special license to lade or unlade without having to make either preliminary or formal entry at the second and subsequent ports. Foreign vessels arriving at a U.S. port from another U.S. port at which formal entry was made may be issued a permit or special license to lade or unlade at the second and subsequent ports prior to formal entry without the necessity of making preliminary entry. In these circumstances, after the master has reported arrival of the vessel, the port director may issue the permit or special license or may, in his discretion, require the vessel to be boarded, the master to make an oath or affirmation to the truth of the statements contained in the vessel's manifest to the Customs officer who boards the vessel, and require delivery of the manifest prior to issuing the permit.

* * * * * * *

Dated: January 26, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, February 1, 1996 (61 FR 3568)]

U.S. Customs Service

General Notices

COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR WEARING APPAREL

AGENCY: Customs Service, Department of the Treasury.

ACTION: Proposed change of practice; extension of comment period.

SUMMARY: On November 16, 1995, Customs published in the Federal Register a document proposing to change the practice regarding the country of origin marking of wearing apparel. Comments were to be received on or before January 16, 1996. This document extends for an additional 60 days the period of time within which interested members of the public may submit comments on the proposed change of practice.

DATES: Comments must be received on or before March 15, 1996.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Special Classification and Marking Branch, Office of Regulations and Rulings (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 16, 1995, Customs published a document in the Federal Register (60 FR 57621) proposing to change the practice regarding the country of origin marking of wearing apparel. Customs previously has ruled that wearing apparel, such as shirts, blouses, coats, sweaters, etc., must be marked with the name of the country of origin by means of a fabric label or label made from natural or synthetic film sewn or otherwise permanently affixed on the inside center of the neck midway between the shoulder seams or in that immediate area or otherwise permanently marked in that area in some other manner. Buttons tags, string tags and other hand tags, paper labels and other similar methods of marking are not acceptable. In the November 16 Federal Register document Customs proposed to change this practice. Customs proposed

to evaluate the marking of such wearing apparel on a case-by-case basis in order to determine whether the requirements of the marking statute, 19 U.S.C. 1304, are satisfied.

The comment period for this proposed change of practice expired on January 16, 1996. However, Customs has received requests from interested parties to extend the period of time for comments in order to afford the parties additional time to prepare responsive comments. Customs believes that it is appropriate to grant the request. Accordingly, the period of time for the submission of comments is extended another 60 days. With the extension, comments must be received on or before March 15, 1996.

Dated: January 26, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, February 1, 1996 (61 FR 3763)]

DATES AND DRAFT AGENDA OF THE THIRTEENTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUBCOMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the thirteenth session of the Harmonized System Review Subcommittee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized system Review Subcommittee of the World Customs Organization.

DATE: February 5, 1996.

FOR FURTHER INFORMATION CONTACT: Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2592) or Myles B. Harmon, Director, International Agreements Staff, U.S. Customs Service (202 482–7000).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States ("HTSUS"). The

Harmonized System Convention is under the jurisdiction of the World Customs Organization ("WCO") (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium.

In order to ensure that the Harmonized System continues to reflect changes in technology and in patterns of international trade, the Harmonized System Review Subcommittee ("RSC") was created as a subcommittee of the HSC. The RSC is responsible for conducting systematic reviews of the Harmonized System on a regular basis in order to assist the HSC in ensuring that the Harmonized System is kept up to date as envisaged by Article 7.1 (a) of the Harmonized System Convention. The first general review of the Harmonized System by the RSC was completed in 1993 and was implemented internationally on January 1, 1996. At its eleventh session, the RSC began work on its next general review of the Harmonized System.

The next session of the RSC will be its thirteenth, and it will be held from February 26 to March 1, 1996, in Brussels, Belgium.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the U.S. Department of the Treasury, represented by the U.S. Customs Service, the U.S. Department of Commerce, represented by the Bureau of the Census, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. government at the sessions of the HSC and RSC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC. The ITC representative serves as the head of the delegation at the sessions of the RSC.

Set forth below is the draft agenda for the next session of the RSC. Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals. In addition, proposals for new matters or items for consideration at future sessions of the RSC may be directed to those same individuals.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Attachment: Attachment A]

Attachment A
39.926 E

DRAFT AGENDA FOR THE THIRTEENTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUB-COMMITTEE

Monday, February 26 (10 a.m.) to Friday, March 1, 1996

I

ADOPTION OF THE AGENDA

Draft Agenda	Doc. 39.926

II

TECHNICAL QUESTIONS

A. *Further Studies:*

1. Separate identification of certain specific categories of vasten (based on the RC, OBCD and UNEP proposals)	Doc. 39.927
2. Possible new subheadings for "concentrated fruit juices"	Doc. 39.926
3. Definition of "put up in packings for retail sale"	Docs. 39.926 40.045
4. Possible amendment to Note 6 to Chapter 90 to clarify the scope of the impressions "Instruments and apparatus for automatically controlling" and "automatic regulators"	Doc. 39.930
5. Possible amendments to the legal texts to simplify the classification of paper or paperboard/metal/plastics products	Docs. 39.931 40.090
6. Proposals by the NTO concerning the possible separate identification in the HS of goods for military use	Doc. 39.932
7. Possible restructuring of Section XVI	Doc. 39.933
8. Possible amendment of subheading 1702.60 to cover sugars and fructose syrups containing 50% or more by weight of fructose	Doc. 39.934
9. Review of the terminology employed in the Harmonized System with respect to persons with disabilities	Doc. 39.935

B. New Questions

(a) *Questions referred by the HBC:*

1. Possible amendment to heading 17.02 so as to clarify the classification of sugar cane juice, etc.	Docs. 39.936 40.078
2. Possible amendment to heading 20.07 to cover preparations which have been heat-treated	Doc. 39.937
3. Possible amendment to Note 1 (a) to Chapter 30 concerning nutritional preparations for intravenous administration	Doc. 39.938
4. Possible amendment of the structure of subheading 2206.4	Docs. 39.939 39.238 (HSC/15)
5. Possible amendments to the legal texts to avoid problems in distinguishing between sheets obtained by slicing laminated wood and traditional veneer sheets	Doc. 39.940
6. Possible amendments to the Nomenclature to clarify the classification of heat-treated minerals	Doc. 39.941

(b) *Proposals by administrations*

1. Amendment to Note 3 (c) to Chapter 7	Doc. 39.906
2. Use of the word "fish" in heading 03.05	Doc. 39.935
3. Proposals by the Swiss Administration for amendments to Chapter 17, 18 and 19	Doc. 40.049
4. Possible amendments to headings 69.04, 69.05 and 69.06	Doc. 40.024

TECHNICAL QUESTIONS—continued

5. Possible amendment to the Nomenclature to provide specifically for "sockeye salmon, frozen"	Doc. 39.920
6. Possible new subheadings for big-eye tunas, bluefin tunas and southern bluefin tunas	Doc. 39.973
7. Proposal by the Japanese Administration concerning heading 12.12	Doc. 39.974
8. Possible amendments to heading 22.06 to create further subheadings for spirits obtained by distilling grape wine or grape mare and for whiskies	Doc. 39.977
9. Creation of a new heading for biodegradable plastics and articles thereof	Doc. 39.982
10. Thickness criterion for flat-rolled products of iron or non-alloy steel, plated or coated with tin	Doc. 39.983
11. Separate identification of anti-corrosive flat-rolled products of iron non-alloy steel, electrolytically plated or coated with zinc	Doc. 39.984
12. Separate identification of anti-corrosive flat-rolled products of iron or non-alloy steel, plated or coated with zinc otherwise than electrolytically	Doc. 39.985
13. Thickness criterion for flat-rolled products of iron on non-alloy steel, plated or coated with chromium oxides or with chromium and chromium oxides	Doc. 39.986
14. Possible amendment to subheading 1204.12 concerning the expression "mordant dyes"	Doc. 39.948
15. Proposal by the EC for the amendment of heading 25.07	Doc. 40.038
16. Possible amendment to the texts of subheadings 3920.41 and 3920.42	Doc. 40.040
17. Possible amendment to heading 60.02	Doc. 40.043
18. Possible amendments to heading 25.16 concerning dolomite	Doc. 40.081

(c) *Proposals by international organizations*

1. Proposal by the WHO concerning pharmaceutical substances	Doc. 39.943
2. Proposal by the DPCN concerning chemicals controlled by the Chemical Weapons Convention	Doc. 39.944
3. Proposal by the UNDCP concerning drugs and psychotropic substances controlled by the UN Conventions	Doc. 39.945

(d) *Other questions*

1. Possible amendments to the Nomenclature to clarify the classification of burdock	Doc. 39.946
2. Possible amendment to heading 84.19	Doc. 39.911
3. Possible amendment to heading 85.14	Doc. 39.922
4. Possible amendment to heading 29.40 to clarify the classification of sugar acetals	Doc. 39.966

III

GENERAL QUESTIONS

1. HB Review on the basis of trade statistics	Doc. 39.923
2. Other	

(Additional list)

1. Separate identification of equipment for the manufacture of semiconductor devices and flat panel displays	Doc. 39.987
2. Possible amendment to subheading 8486.90 to give separate status to linear motion guides	Doc. 39.988
3. Possible amendments to subheading 9009.90 concerning parts of photocopying apparatus	Doc. 39.989
4. Possible amendment to heading 90.13 concerning liquid crystal displays	Doc. 40.001

Note: Some other additional items may be received later.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 31, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

PATRICIA A. TODARO,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A DIGITAL ANSWERING MACHINE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a digital telephone answering machine. Notice of the proposed revocation was published December 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 52.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 15, 1996.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Branch, Tariff Classification Appeals Division, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 27, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 52, proposing to revoke New York Ruling Letter (NY) 803541 issued on November 9, 1994, which concerned the tariff classification of the Murata VOMAX VF1000 answering machine. No comments were received. The answering machine, which was believed to be an integral part of a standard telephone set (i.e., a tele-

phone set incorporating an answering machine), was held to be classifiable under subheading 8517.81.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other telephonic apparatus.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 803541 to reflect the proper classification of the answering machine, which does not incorporate a telephone set, but is used **in conjunction with** one, under subheading 8520.20.00, HTSUS, which provides for telephone answering machines. Headquarters Ruling Letter 958347 revoking NY 803541 is set forth in an Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 29, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:MM 958347 LTO
Category: Classification
Tariff No. 8520.20.00

MS. LINDA M. CHRISTY-MOHABEER
SEKIN TRANSPORT INTERNATIONAL
P.O. Box 655454
Dallas, TX 75265–5464

Re: Digital telephone answering machines; subheading 8517.81.00; EN 85.17: EN 85.20; Section XVI, Note 3; HQs 084990, 957243; NY 803541 *revoked.*

DEAR MS. CHRISTY-MOHABEER:

This is in response to your letter of April 11, 1995, to the Customs Service office in Dallas, Texas, and your letter of August 22, 1995, to this office, requesting the classification of the Murata VOMAX VF1000 telephone answering machine under the Harmonized Tariff Schedule of the United States (HTSUS). Specifically, you request that we reconsider NY 803541, issued by the Area Director of Customs, New York Seaport, on November 9, 1994. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter "section 625"), notice of the proposed revocation of NY 803541 was published December

27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 52. No comments were received in response to the notice.

Facts:

The article in question is the Murata VOMAX VF1000 telephone answering machine ("VF1000"), which is a digital answering machine and messaging unit that is used in conjunction with a telephone set. It does not incorporate a telephone set. The VF1000 is used to record and playback voice messages.

The VF1000 is also a full send and receive fax device. Received faxes can be printed or viewed in several ways: on a standard fax machine when connected to the VF1000 via phone jack; on a printer when connected via an optional printer interface; and on a television receiver when connected via a TV interface (for direct viewing on any standard NTSC or PAL television sets). Other features include pager notification, which when programmed, notifies the user whenever a voice call or fax call have been received, and remote access, which permits the user to retrieve voice or fax messages on a remote touchtone telephone by using a security code.

Issue:

Whether the VF1000 digital telephone answering machines are classifiable under heading 8517, HTSUS, which provides for electrical apparatus for line telephony, or heading 8520, HTSUS, which provides for other sound recording apparatus.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

In NY 803541, issued by the Area Director of Customs, New York Seaport, on November 9, 1994, the VF1000, which was believed to be an integral part of a standard telephone set (i.e., a telephone set incorporating an answering machine), was held to be classifiable under subheading 8517.81.00, HTSUS, which provides for other telephonic apparatus. *See* EN 85.17, pg. 1361 (which provides that the heading covers telephone sets "in which a telephone set * * * and a device for the transmission of recorded messages, and sometimes, the recording of incoming calls constitute an integrated unit"). The VF1000, however, does not incorporate a telephone set. Rather, it is used **in conjunction with** a telephone set, and it is classifiable in accordance with HQ 957243, dated February 16, 1995. In HQ 957243, this office determined that a similar digital answering machine, the "Bogen Answering Machine," was classifiable under subheading 8520.20.00, HTSUS, which provides for magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device: telephone answering machines.

EN 85.20, pg. 1368, states that heading 8520, HTSUS, "covers all sound recording apparatus, whatever the purpose for which it is intended * * *. The heading also includes sound recording apparatus, incorporating a sound reproducing device." EN 85.20, pg. 1369, further states that the heading covers combined sound recording and reproducing apparatus, including **"[t]elephone answering machines** designed to operate in conjunction with a telephone set (but not forming an integral part of the set) to transmit a message previously recorded by the telephone subscriber and to record messages left by the caller (by means of an integral sound recording device) (emphasis in original)."

The VF1000 is designed to operate in conjunction with a telephone set to transmit a recorded message and to record messages left by the caller. The machines, which record the messages digitally in RAM memory, rather than on a magnetic tape, are sound recording apparatus incorporating a sound reproducing device. They are therefore classifiable under heading 8520, HTSUS, specifically under subheading 8520.20.00, HTSUS. While the VF1000 can also receive (on a **separate** fax machine, printer or television receiver) and redirect facsimile messages, the device's principal function is sound recording. *See* Section XVI, Note 3, HTSUS (for a contrasting decision on the classification of a facsimile machine that also functioned as a hands-free speaker telephone and an answering machine, *see* HQ 084990, dated October 3, 1989). Accordingly, NY 803541 is revoked.

Holding:

The Murata VOMAX VF1000 digital telephone answering machines are classifiable under subheading 8520.20.00, HTSUS, which provides for telephone answering machines. The corresponding rate of duty for articles of this subheading is 3.1% *ad valorem*.

In accordance with 19 U.S.C. 625, this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF TRAZODONE HYDROCHLORIDE IMPORTED IN BULK FORM

AGENCY: U.S. Customs, Department of Treasury.

ACTION: Notice of modification of classification ruling letter.

SUMMARY: Pursuant to § 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by § 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling classifying under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) trazodone hydrochloride imported in bulk form. Notice of the proposed modification was published on December 20, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 51.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 15, 1996.

FOR FURTHER INFORMATION CONTACT: Edward A. Bohannon, Food and Chemical Classification Branch, (202) 482–7064 or –7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 20, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 51, proposing to modify New York Ruling Letter (NYRL) 891765 issued November 16, 1993, determined among other issues, that trazodone hydrochloride, bulk form, CAS No. 19794–93–5, was classifiable according to chemical structure under subheading 2933.90.6100, HTSUSA, a provision describing "Heterocyclic compounds with nitrogen hetero-atom(s) only; nucleic acids and their salts: Other: Aromatic or modified aromatic: Other: Drugs: Drugs primarily affecting the central nervous system: Antidepressants, tranquilizers and other psychotherapeutic agents: Other." Merchandise

entered in 1993 under the foregoing provision would have been liquidated at the column 1 General rate of duty of 16.6 percent *ad valorem*.

No comments were received in response to the notice.

Upon review of NYRL 891765, Customs finds that the Chemical Abstract Service Number published therein was incorrect and is of the opinion that trazodone hydrochloride imported in bulk form is properly classifiable according to its chemical structure under subheading 2933.59.4500, HTSUSA, a provision for "Heterocyclic compounds with nitrogen hetero-atom(s) only; nucleic acids and their salts: Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure; nucleic acids and their salts: Other: Drugs: Aromatic or modified aromatic: Antidepressants, tranquilizers and other psychotherapeutic agents." Merchandise entered in 1993 under the foregoing provision would have been liquidated at the column 1 General rate of duty of 16.6 percent *ad valorem*. The correct Chemical Abstract Service Number for trazodone hydrochloride is 25332–39–2.

Pursuant to § 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by § 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL 891765 regarding classifying under the HTSUSA trazodone hydrochloride imported in bulk form. Headquarters Ruling Letter Letter (HRL) 957956, modifying NYRL 891765, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with § 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 25, 1996.

THOMAS L. LOBRED,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 25, 1996.

CLA–2 R:C:F 957956 EAB
Category: Classification
Tariff No. 2933.59.4500

MS. JOAN VON DOEHREN
INTERCHEM CORPORATION
120 Rt. 17 North, Suite 1115
Paramus, NJ 07652

Re: Tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of trazodone hydrochloride imported in bulk form, CAS No. 25332–39–2 not listed; General Note 3(c)(1), Pharmaceutical Appendix; NYRL 891765 modified.

DEAR MS. VON DOEHREN:

This decision concerns New York Ruling Letter (NYRL) 891765 issued November 16, 1993 In that decision, Customs stated in pertinent part that trazodone hydrochloride, an antidepressant drug, imported in bulk form, was classifiable under subheading 2933.90.6100, HTSUSA (1993) and subject to the column 1 General rate of duty of 16.6 percent *ad valorem*. Customs also stated therein that the Chemical Abstract Service Number (CAS No.) for the compound was 19794–93–5.

Upon review of NYRL 891765, Customs has determined that the CAS No. for trazodone hydrochloride published therein was incorrect and that the compound was incorrectly classified under the HTSUSA. NYRL 891765 is modified as follows.

Facts:

Trazodone hydrochloride, the preferred chemical name of which is 2-[3-[4-(3-Chlorophenyl)-I-piperazinyl]propyl]-1,2,4-triazolo[4,3-a]pyridin-3(2H)-one, hydrochloride, CAS No. 25332–39–2 not listed in the Chemical Appendix to the Tariff Schedule, is a heterocyclic compound with nitrogen hetero-atoms only, containing a piperazine ring in the structure.

Trazodone is listed in the Pharmaceutical Appendix to the Tariff Schedule, alphabetically in Table 1. Hydrochloride is listed in the Pharmaceutical Appendix to the Tariff Schedule alphabetically in Table 2.

Issue:

What is the tariff classification and rate of duty of trazodone hydrochloride, the preferred chemical name of which is 2-[3-[4-(3-Chlorophenyl)-I-piperazinyl]propyl] -1,2,4-triazolo[4,3-a]pyridin-3(2H)-one, hydrochloride, CAS No. 25332–39–2 not listed in the Chemical Appendix to the Tariff Schedule, imported in bulk form?

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUSA. The tariff classification of merchandise under the HTSUSA is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRI's taken in order.

Based upon its chemical structure, trazodone hydrochloride imported in bulk form is classifiable under subheading 2933.59.4500, HTSUSA. "Trazodone" and "hydrochloride" are listed in Table 1 and Table 2, respectively, of the Pharmaceutical Appendix to the Tariff Schedule; therefore, trazodone hydrochloride may be entered free of duty pursuant to General note 3(c)(1), HTSUSA.

Holding:

Trazodone hydrochloride, the preferred chemical name of which is 2-[3-[4-(3-Chlorophenyl)-I-piperazinyl]propyl]-1,2,4-triazolo[4,3-a]pyridin-3(2H)-one, hydrochloride, CAS No. 25332–39–2 not listed in the Chemical Appendix to the Tariff Schedule, imported in bulk form is classifiable under subheading 2933.59.4500, HTSUSA, a provision for "Hetero-

cyclic compounds with nitrogen hetero-atom(s) only; nucleic acids and their salts: Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure; nucleic acids and their salts: Other: Drugs: Aromatic or modified aromatic: Antidepressants, tranquilizers and other psychotherapeutic agents."

Merchandise classified under the foregoing subheading is entitled to be entered free of duty under the Agreement on Trade in Pharmaceutical Products, pursuant to General note 3(c)(1), HTSUSA.

NYRL 891765 is modified.

THOMAS L. LOBRED,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF VARIOUS ARTICLES OF TOILET AND KITCHEN LINEN MADE FROM TERRY TOWELING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying ruling letters pertaining to the tariff classification of various articles of toilet and kitchen linen made of terry toweling. Notice of the proposed modification was published December 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 52.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after April 15, 1996.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Branch, Office of Regulations and Rulings, (202) 482–7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 27, 1925, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 52, proposing to modify New York Ruling Letters (NYRL's) 860805 (3/19/91), 883178 (3/15/93), 883181 (3/15/93), 883482 (3/26/93), 891912 (11/18/93), 891949 (11/22/93), 891950 (11/23/93), 891951 (11/24/93), 892210 (12/3/93), 892820 (12/21/93), and Headquarters Ruling Letter (HRL) 951902 (8/28/92). In those rulings various articles of toilet and kitchen linen made of 100 percent cotton woven fabric in which one side of the articles' fabric consisted of velour (sheared pile) and the other of terry loops, were classi-

fied under subheadings 6302.91.0005, 6302.91.0015, or 6302.91.0025, Harmonized Tariff Schedule of the United States Annotated (HTSUSA) as towels and other articles of toilet linen of "pile or tufted construction." No comments were received from interested parties.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL's 860805 (3/19/91), 883178 (3/15/93), 883181 (3/15/93), 883482 (3/26/93), 891912 (11/18/93), 891949 (11/22/93), 891950 (11/23/93), 891951 (11/24/93), 892210 (12/3/93), 892820 (12/21/93), and HRL 951902 (8/28/92) to reflect proper classification of the various articles of toilet and kitchen linen under subheadings 6302.60.0010, 6302.60.0020 or 6302.60.0030, HTSUSA, which provides for towels and articles of toilet and kitchen linen of terry toweling. HRL's 958199, 958200, 958203, 958202, 958204, 958205, 958206, 958207, 958208, 958201 and 958198, which serve to modify the above cited rulings, are set forth in Attachments to A through K to this notice.

Publication of rulings or decisions pursuant to section 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 29, 1996.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958199 SK
Category: Classification
Tariff No. 6302.60.0020

JOHN V. CARR & SON, LTD.
400 Tradeport Blvd., ste. 408
Atlanta, GA 30354

Re: Modification of NYRL 860805 (3/19/91); classification of 100 percent cotton beach towel; 6302.60.0020, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile): terry toweling.

DEAR SIR OR MADAM:

On March 19, 1991, the New York port issued you New York Ruling Letter (NYRL) 860805 in which Customs classified a backpack containing a beach towel and a beverage holder. Upon review, this office has determined that the classification set forth in that rul-

ing pertaining to the beach towel is incorrect. Accordingly, this ruling modifies only that part of NYRL 860805 which classified the subject beach towel under subheading 6302.91.0015, Harmonized Tariff Schedule of the United States (HTSUSA). Our analysis follows.

Facts:

The beach towel at issue in NYRL 860805 is made of 100 percent cotton woven fabric and measures approximately 45 inches by 7.1 inches. Two of the towel's edges are turned and stitched, the other two edges are selvaged. One side of the towel is velour (sheared pile), the reverse side of the towel has terry loops. The velour side of the fabric is printed with a "California Beach Club" logo.

Issue:

Whether the beach towel is classifiable as a towel made of "terry toweling" under subheading 6302.60.0020, HTSUSA, or as a towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0015, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a beach towel, classification is proper within this heading. The determinative issue is whether the subject towel is classifiable as a towel made of "terry toweling" under subheading 6302.60.0020, HTSUSA, or as a towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0015, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the beach towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0020, HTSUSA, which provides for, *inter alia*, other towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 860805 is modified with respect to the classification of the beach towel set forth therein.

The beach towel is classifiable under subheading 6302.60.0020, HTSUSA, which provides for, *inter alia*, other towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 363.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958200 SK
Category: Classification
Tariff No. 6302.60.0020 and 6302.60.0030

J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, NY 10038

Re: Modification of NYRL 883178 (3/15/93); classification of 100 percent cotton bath towel; hand towel; washcloth; 6302.60.0020 and 6302.60.0030, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On March 15, 1993, the New York port issued you New York Ruling Letter (NYRL) 883178 in which Customs classified a bath towel, a hand towel and a washcloth. Upon review, this office has determined that the classifications set forth in that ruling are incorrect. Our analysis follows.

Facts:

The bath towel, hand towel and washcloth at issue in NYRL 883178 are made of 100 percent cotton woven fabric. The bath towel measures approximately 22 inches by 42 inches. The hand towel measures approximately 16 inches by 25 inches. The washcloth measures approximately 12 inches by 12 inches. One side of these articles has a velour finish (sheared pile), the reverse side consists of uncut terry loops. The velour side of the fabric features a fan applique and an embroidered floral bow design.

Issue:

Whether the subject articles are classifiable as towels and other articles of toilet linen of "pile or tufted construction" under subheading 6302.91.0015 and 6302.91.0025, HTSUSA, or as towels and other articles of toilet linen of "terry toweling" under subheading 6302.60.0020 and 6302.60.0030, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towels and washcloth at issue are toilet linen, classification is proper within this heading. The determinative issue is whether the subject articles are deemed to be of "terry toweling" so as to warrant classification under subheading 6302.60.0020 and 6302.60.0030, HTSUSA, or whether they are made of a pile or tufted construction.

The subject articles are made of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the bath towel, hand towel and washcloth meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0020 and 6302.60.0030, HTSUSA, which provides for, *inter alia,* bath and hand towels, and other articles of toilet linen, of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 883178 is modified.

The bath towel and hand towel are classifiable under subheading 6302.60.0020, HTSUSA, which provides for, *inter alia,* other towels of cotton terry toweling or similar

terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 363.

The washcloth is classifiable under subheading 6302.60.0030, HTSUSA, which provides for, *inter alia*, toilet linen and kitchen linen, of terry toweling or similar terry fabrics, of cotton * * * other * * *, dutiable at a rate of 10.2 percent *ad valorem*. The textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958203 SK
Category: Classification
Tariff No. 6302.60.0010

J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, NY 10038

Re: Modification of NYRL 883181 (3/15/93); classification of 100 percent cotton terry kitchen dish towel; 6302.60.0010, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On March 15, 1993, the New York port issued you New York Ruling Letter (NYRL) 883181 in which Customs classified a kitchen towel, dishcloth and potholder. Upon review, this office has determined that the classification set forth in that ruling pertaining to the kitchen towel is incorrect. Accordingly, this ruling modifies only that part of NYRL 883181 which classifies kitchen towels under subheading 6302.91.0005, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our analysis follows.

Facts:

The kitchen towel at issue in NYRL 883181 is made of 100 percent cotton woven fabric and measures approximately 15 inches by 23 inches. Two edges of the kitchen towel are hemmed and there is one inch fringe in the warp direction. One side of the towel is velour (sheared pile), the reverse side of the towel has terry loops. The velour side of the fabric is printed both the words "Kitchen Towel."

Issue:

Whether the kitchen towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's).

GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a kitchen towel, classification is proper within this heading. The determinative issue is whether the subject towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the kitchen towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, dish towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 883181 is modified with respect to the classification of the kitchen towel set forth therein.

The kitchen towel is classifiable under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, dish towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958202 SK
Category: Classification
Tariff No. 6302.60.0020 and 6302.60.0030

J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, NY 10038

Re: Modification of NYRL 883482 (3/26/93); classification of 100 percent cotton bath towel and washcloth; 6302.60.0020 and 6302.60.0030, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On March 26, 1993, the New York port issued you New York Ruling Letter (NYRL) 883482 in which Customs classified a bath towel and a washcloth. Upon review, this office

has determined that the classifications set forth in that ruling are incorrect. Our analysis follows.

Facts:

The bath towel and washcloth at issue in NYRL 883482 are made of 100 percent cotton woven fabric. The bath towel measures approximately 21¼ inches by 40 inches. The washcloth measures approximately 11¾ inches by 12 inches. One side of these articles has a velour finish (sheared pile), the reverse sides consist of uncut terry loops. The velour side of these articles features a sea shell design.

Issue:

Whether the subject articles are classifiable as towels and other articles of toilet linen of "pile or tufted construction" under subheadings 6302.91.0015 and 6302.91.0025, HTSUSA, or as towels and other articles of toilet linen of "terry toweling" under subheadings 6302.60.0020 and 6302.60.0030, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel and washcloth at issue are toilet linen, classification is proper within this heading. The determinative issue is whether the subject articles are deemed to be of "terry toweling" so as to warrant classification under subheading 6302.60.0020 and 6302.60.0030, HTSUSA, or whether they are made of a pile or tufted construction.

The subject articles are made of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA; page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the bath towel and washcloth meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0020 and 6302.60.0030, HTSUSA, which provides for, *inter alia,* bath and hand towels, and other articles of toilet linen, of cotton terry, toweling or similar terry fabrics.

Holding:

NYRL 883482 is modified.

The bath towel is classifiable under subheading 6302.60.0020, HTSUSA, which provides for, *inter alia,* other towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 363.

The washcloth is classifiable under subheading 6302.60.0030, HTSUSA, which provides for, *inter alia,* toilet linen and kitchen linen, of terry toweling or similar terry fabrics, of cotton * * * other * * *, dutiable at a rate of 10.2 percent *ad valorem*. The textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958204 SK
Category: Classification
Tariff No. 6302.60.0010

J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, NY 10038

Re: Modification of NYRL 891912 (11/18/93); classification of 100 percent cotton terry kitchen dish towel; 6302.60.0010, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On November 18, 1993, the New York port issued you New York Ruling Letter (NYRL) 891912 in which Customs classified a kitchen towel, potholder, wooden spoon, pen and index cards. Upon review, this office has determined that the classification set forth in that ruling pertaining to the kitchen towel is incorrect. Accordingly, this ruling modifies only that part of NYRL 891912 which classifies kitchen towels under subheading 6302.91.0005, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our analysis follows.

Facts:

The kitchen towel at issue in NYRL 891912 is made of 100 percent cotton woven fabric and measures approximately 41 centimeters by 64 centimeters. All four edges are hemmed. One side of the towel is velour (sheared pile), the reverse side of the towel has terry loops. The velour side of the fabric is printed with a country rabbit floral design.

Issue:

Whether the kitchen towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a kitchen towel, classification is proper within this heading. The determinative issue is whether the subject towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the kitchen towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, dish towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 891912 is modified with respect to the classification of the kitchen towel set forth therein.

The kitchen towel is classifiable under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, dish towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958205 SK
Category: Classification
Tariff No. 6302.60.0010

J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, NY 10038

Re: Modification of NYRL 891949 (11/22/93); classification of 100 percent cotton terry kitchen dish towel; 6302.60.0010, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On November 22, 1993, the New York port issued you New York Ruling Letter (NYRL) 891949 in which Customs classified kitchen towels, potholders, wooden spoons and cookie cutters. Upon review, this office has determined that the classification set forth in that ruling pertaining to kitchen towels is incorrect. Accordingly, this ruling modifies only that part of NYRL 891949 which classifies kitchen towels under subheading 6302.91.0005, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our analysis follows.

Facts:

The kitchen towel at issue in NYRL 891949 is made of 100 percent cotton woven fabric. The towel measures approximately 41 centimeters by 64 centimeters. All four edges are hemmed. One side of the towel is velour (sheared pile), the reverse side of the towel has terry loops. The velour side of the fabric is printed with a country piglet/floral design.

Issue:

Whether the subject towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a kitchen dish towel, classification is proper within this

heading. The determinative issue is whether the subject towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.41.0005, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the kitchen dish towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia,* kitchen dish towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 891949 is modified with respect to the classification of the kitchen dish towel set forth therein.

The kitchen dish towel is classifiable under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia,* kitchen dish towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CIA–2 RR:TC:TE 958206 SK
Category: Classification
Tariff No. 6302.60.0010

J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, NY 10038

Re: Modification of NYRL 891950 (11/23/93); classification of 100 percent cotton terry kitchen dish towels; 6302.60.0010, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On November 23, 1993, the New York port issued you New York Ruling Letter (NYRL) 891950 in which Customs classified kitchen towels, potholders, wooden spoons and a magnet. Upon review, this office has determined that the classification set forth in that ruling pertaining to kitchen towels is incorrect. Accordingly, this ruling modifies only that part of

NYRL 891950 which classifies kitchen towels under subheading 6302.91.0005, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our analysis follows.

Facts:

The two kitchen towels at issue in NYRL 891950 are made of 100 percent cotton woven fabric. Both towels measure approximately 41 centimeters by 64 centimeters and all of their edges are hemmed. One side of each towel is velour (sheared pile), the reverse side of each towel has terry loops. The velour sides of the towels are printed with Santa Claus face and holly leaf design.

Issue:

Whether the subject towels are classifiable as dish towels made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as dish towels made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towels at issue are kitchen dish towels, classification is proper within this heading. The determinative issue is whether the subject towels are classifiable as dish towels made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as dish towels made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

The subject towels are comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, hut sometimes on one only" * * * and "may sometimes be cut." As the fabric of the kitchen dish towels at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia,* kitchen dish towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 891950 is modified with respect to the classification of the kitchen dish towels set forth therein.

The kitchen dish towels are classifiable under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia,* kitchen dish towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958207 SK
Category: Classification
Tariff No. 6302.60.0010

J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, NY 10038

Re: Modification of NYRL 891951 (11/24/93); classification of 100 percent cotton terry kitchen dish towel; 6302.60.0010, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On November 24, 1993, the New York port issued you New York Ruling Letter (NYRL) 891951 in which Customs classified a kitchen towel, potholder and an oven mitt. Upon review, this office has determined that the classification set forth in that ruling pertaining to the kitchen towel is incorrect. Accordingly, this ruling modifies only that part of NYRL 891951 which classifies kitchen towels under subheading 6302.91.0005, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our analysis follows.

Facts:

The kitchen towel at issue in NYRL 891951 is made of 100 percent cotton woven fabric and measures approximately 15 inches by 25 inches. All four of the edges are hemmed. One side of the towel is velour (sheared pile), the reverse side of the towel has terry loops. The velour side of the fabric is printed with a floral design.

Issue:

Whether the kitchen towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.00107 HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a kitchen towel, classification is proper within this heading. The determinative issue is whether the subject towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the kitchen towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia,* dish towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 891951 is modified with respect to the classification of the kitchen towel set forth therein.

The kitchen towel is classifiable under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia,* dish towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT I]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958208 SK
Category: Classification
Tariff No. 6302.60.0010

W.A. PHELPS & CO., INC.
ONE WORLD TRADE CENTER
Suite 2109
New York NY 10048

Re: Modification of NYRL 892210 (12/3/93); classification of 100 percent cotton terry kitchen dish towel; 6302.60.0010, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On December 3, 1993, the New York port issued you New York Ruling Letter (NYRL) 892210 in which Customs classified a kitchen towel, potholder and dishcloth. Upon review, this office has determined that the classification set forth in that ruling pertaining to the kitchen towel is incorrect. Accordingly, this ruling modifies only that part of NYRL 892210 which classifies kitchen towels under subheading 6302.91.0005, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our analysis follows.

Facts:

The kitchen towel at issue in NYRL 892210 is made of 100 percent cotton woven fabric and measures approximately 40 centimeters by 56 centimeters, exclusive of a 2.5 centimeter fringe in the warp direction. Two edges of the kitchen towel are hemmed. One side of the towel is velour (sheared pile), the reverse side of the towel has terry loops. The velour side of the fabric is printed with a floral design and the words "Kitchen Towel."

Issue:

Whether the kitchen towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a kitchen towel, classification is proper within this heading. The determinative issue is whether the subject towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the kitchen towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, dish towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 892210 is modified with respect to the classification of the kitchen towel set forth therein.

The kitchen towel is classifiable under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, dish towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT J]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA-2 RR:TC:TE 958201 SK
Category: Classification
Tariff No. 6302.60.0020

ACTIONS & COMPANY
129 West Hovey Avenue
San Gabriel, CA 91776

Re: Modification of NYRL 892820 (12/21/93); classification of 100 percent cotton beach towel; 6302.60.0020, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On December 21, 1993, the New York port issued you New York Ruling Letter (NYRL) 892820 in which Customs classified a duffel bag containing a beach towel. Upon review, this office has determined that the classification set forth in that ruling pertaining to the beach towel is incorrect. Accordingly, this ruling modifies only that part of NYRL 892820 which

classified the subject beach towel under subheading 6302.91.00157 Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Our analysis follows.

Facts:

The beach towel at issue in NYRL 892820 is made of 100 percent cotton woven fabric and measures approximately 75 centimeters by 105 centimeters. One side of the towel is velour (sheared pile) and printed, the reverse side of the towel has terry loops.

Issue:

Whether the beach towel is classifiable as made of "terry toweling" under subheading 6302.60.0020, HTSUSA, or as a towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0015, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a beach towel, classification is proper within this heading. The determinative issue is whether the subject towel is classifiable as a towel made of "terry toweling" under subheading 6302.60.0020, HTSUSA, or as a towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0015, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced of both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the beach towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0020, HTSUSA, which provides for, *inter alia,* other towels of cotton terry toweling or similar terry fabrics.

Holding:

NYRL 892820 is modified with respect to the classification of the beach towel set forth therein.

The beach towel is classifiable under subheading 6302.60.0020, HTSUSA, which provides for, *inter alia,* other towels of cotton terry toweling or similar terry fabrics. The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 363.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT K]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1996.

CLA–2 RR:TC:TE 958198 SK
Category: Classification
Tariff No. 6302.60.0010

J.W. HAMPTON, JR. & CO.
15 Park Row
New York, NY 10038

Re: Modification of HRL 951902 (8/28/92); classification of 100 percent cotton terry kitchen dish towel; 6302.60.0010, HTSUSA; EN to heading 5802, HTSUSA; one-side printed velour (sheared pile); terry toweling.

DEAR SIR OR MADAM:

On August 28, 1992, this office issued you Headquarters Ruling Letter (HRL) 951902 in which Customs classified a kitchen towel and dishcloth. Upon review, this office has determined that the classification set forth in that ruling pertaining to the kitchen towel is incorrect. Accordingly, this ruling modifies only that part of HRL 951902 which classifies kitchen towels under subheading 6302.91.0005, Harmonized Tariff Schedule of the United States (HTSUSA). Our analysis follows.

Facts:

The kitchen towel at issue in HRL 951902 is made of 100 percent cotton woven fabric and measures approximately 41 centimeters by 62.5 centimeters. All four of the kitchen towel's edges are hemmed. One side of the towel is velour (sheared pile), the reverse side of the towel has terry loops. The velour side of the fabric is printed with a Christmas tree design.

Issue:

Whether the kitchen towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6302, HTSUSA, provides for, "[B]ed linen, table linen, toilet linen and kitchen linen." As the towel at issue is a kitchen dish towel, classification is proper within this heading. The determinative issue is whether the subject towel is classifiable as a dish towel made of "terry toweling" under subheading 6302.60.0010, HTSUSA, or as a dish towel made of "other" fabric of pile or tufted construction under subheading 6302.91.0005, HTSUSA?

The subject towel is comprised of fabric which is looped on one side and has sheared loops on the reverse side (velour toweling). The Explanatory Notes (EN) to heading 5802, HTSUSA, page 795, while not legally binding, represent the official interpretation of the HTS at the international level. The EN describe those fabrics which are considered to be of terry toweling for classification purposes and include those fabrics where "the loops often appear twisted and are generally produced on both sides of the cloth, but sometimes on one only" * * * and "may sometimes be cut." As the fabric of the kitchen dish towel at issue meets the EN's description of terry toweling, classification is proper under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, kitchen dish towels of cotton terry toweling or similar terry fabrics.

Holding:

HRL 951902 is modified with respect to the classification of the kitchen dish towel set forth therein.

The kitchen dish towel is classifiable under subheading 6302.60.0010, HTSUSA, which provides for, *inter alia*, kitchen dish towels of cotton terry toweling or similar terry fabrics.

The towels are dutiable at a rate of 10.2 percent *ad valorem* and the textile quota category is 369.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at the local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF CUSTOMS SERVICE DECISION RELATING TO THE TARIFF TREATMENT UNDER 9802.00.60, HTSUS, OF ALUMINUM CAN BODIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of Customs Service Decision.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993), this notice advises interested parties that Customs is modifying a Customs Service Decision pertaining to the tariff treatment under 9802.00.60, HTSUS, of aluminum can bodies. Notice of the proposed modification was published on December 20, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 51.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption April 15, 1996.

FOR FURTHER INFORMATION CONTACT: Anthony Tonucci, Special Classification and Marking Branch, (202–482–7073).

SUPPLEMENTAL INFORMATION:

BACKGROUND

On December 20, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 51, proposing to modify Customs Service Decision (C.S.D.) 84–89 dated November 15, 1983, pertaining to the tariff treatment under 9802.00.60, HTSUS, of aluminum can bodies No comments were received in response to this notice. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American

Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) this notice advises interested parties that Customs is modifying C.S.D. 84–89 to reflect that gas tungsten arc welding ("GTAW") constitutes "further processing" for purposes of subheading 9802.00.60, HTSUS. C.S.D. 84–89 is set forth in Attachment A to this document. Headquarter's Ruling Letter 557992 modifying C.S.D. 84–89 is set forth in Attachment B to this document. Whether other types of welding operations, other than GTAW, constitute "further processing" for purposes of subheading 9802.00.60, HTSUS, will be determined on a case-by-case basis.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 23, 1996.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE
Washington, DC, January 23, 1996.

CLA–2 RR:TC:SM 557992 AT
Category: Classification
Tariff No. 8109.90.00 and 9802.00.60

PATRICK D. GILL, ESQ.
RODE & QUALEY
295 Madison Avenue
New York, NY 10017

Re: Modification of C.S.D. 84–49; Classification and applicability of partial duty exemption under HTSUS subheading 9802.00.60 to zirconium tubes manufactured in Germany of U.S. origin zirconium and returned to the U.S. for further processing; "further processing".

DEAR MR. GILL:

This is in response to your letter dated May 27, 1994, and supplemental information dated September 14, 1995, submitted on behalf of Siemens Power Corporation ("Siemens"), requesting a ruling concerning the classification and applicability of the partial duty exemption under subheading 9802.00.60, HTSUS, to zirconium tubes imported into the U.S. We regret the delay in responding.

Facts:

According to your submission, Siemens intends to import into the U.S., zirconium tubes manufactured in Germany to be further processed and used in the manufacture of nuclear fuel rods for nuclear reactors. You state that there are three discreet processing steps performed sequentially in the United States, Germany and the United States which lead to the manufacture of the finished fuel rods.

First, in the U.S., zircon sand of United States origin is crushed, blended and otherwise processed into a zirconium ingot. This ingot is then forged, extruded and formed on a tube rocker into tube stock or semifinished tubing, designated TREX. This TREX tubing is then exported to Germany where it is subjected to three successive cold reductions using the Pilger process. This process reduces both the diameter and wall thickness of the tubing with a mandrel and a pair of rolls which rotate continuously. The tubing is annealed between each cold reduction and both inside and outside diameters etch cleaned with acid to remove surface impurities and to reveal microscopic cracks in the surface of the metal. After the third cold reduction, the tubing is straightened, grit blasted, etched on the inside diameter, belt polished and cut to final lengths consistent with the length of the fuel rods or elements into which they will be finished. This is their condition upon return to the U.S.

In the U.S., the imported zirconium tubes are further processed by Siemens into fuel rods for nuclear reactors. First, the zirconium tubes are cleaned, dried and inspected by Siemens. Then, lower end caps are welded to the zirconium tubes using a tungsten inert gas welding process in a purged chamber, making sure that the weld is free of moisture or other contaminants, after which uranium pellets are inserted into the tubes. Cleaned and inspected springs are then added to the lower-end welded cap and the loaded fuel rods are inserted individually into high pressured TIG welders. The fuel rods are then evacuated to remove air and back filled with helium to the design pressure of the fuel rod. Upper end caps, which have been cleaned and inspected, are then welded onto the upper portion of the fuel rod. The finished fuel rods are tested for defects, subjected to a radiographic examination by quality control, and the integrity of both upper and lower welds is determined. Minimum weld cover, contact between the upper end cap and the spring, presence of foreign material, and visual appearance are checked during this inspection. The fuel rods are then put through a final inspection which includes verification of serial numbers, inspections for weld color, autoclave finish, length, weld overhand, rod straightness, end cap straightness, and visual appearance. Inspected rods are then placed in storage trays to await release to bundle assembly by quality control.

You state that the process by which the zirconium end caps are welded to the imported zirconium tubes to produce the finished fuel rods is known as gas tungsten arc welding ("GTAW"), also known as TIG (tungsten inert gas) welding. GTAW is a process wherein coalescence of metals is produced by heating them with an arc between a tungsten (nonconsumable) electrode and the work. The weld is made by applying the arc so that the abutting work pieces are melted and joined together as the weld metal solidifies. Although filler metal may be added during the GTAW welding process, because this process is used extensively for the welding of longitudinal seams of thin wall stainless steel and alloy pressure pipe and tubing, generally filler metal is not used, as is the case with the zirconium tubes.

You contend that the zirconium tubes manufactured in Germany from U.S. origin Trex which are returned to the U.S. to be further processed and used in the manufacture of fuel rods should be classified under subheading 8109.90.00, HTSUS and are eligible for the partial duty exemption under subheading 9802.00.60, HTSUS.

Issues:

1. Whether the zirconium tubes, as imported, are articles of zirconium or unfinished fuel elements for nuclear reactors or unfinished parts of fuel elements.

2. Whether the zirconium tubes manufactured in Germany from U.S. origin Trex which are returned to the U.S. to be used in the manufacture of fuel rods, in the manner described above, qualify for a partial duty exemption available under subheading 9802.00.60, HTSUS, when imported into the U.S.

Law and Analysis:

PROPER CLASSIFICATION OF THE MERCHANDISE

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Under GRI 2(a), an incomplete or unfinished article is to be classified as the complete or finished article provided it has the essential character of the complete or finished article. The provisions of GRI 2(a) apply both to articles and to parts of articles.

Tubes and pipes of specific base metals are provided for in provisions of chapters 73, 74, 75, 76 and 78. However, there is no corresponding provision in the HTSUS for pipes and

tubes of zirconium. Heading 8109 provides for zirconium and articles thereof, including waste and scrap.

Heading 8401 covers, among other things, fuel elements (cartridges), non-irradiated, for nuclear reactors, and parts thereof. The finished fuel rods are classifiable in subheading 8401.30.00, HTSUS, a provision for fuel elements (cartridges), non-irradiated, and parts thereof. Although imported cut to length, the zirconium tubes are in an otherwise bare configuration. They are without end caps and special attachments for handling, and lack supports to keep them spaced apart and fixed in place. Most importantly, they lack the uranium fuel in pellet form. For these reasons, we agree with counsel's contention that, as imported, the zirconium tubes lack the essential character, under GRI 2(a), either of finished or complete fuel elements or of parts of such elements. Thus, under the authority of GRI 1, the zirconium tubes, as described above, are provided for in heading 8109. Accordingly, the tubes are classifiable in subheading 8109.90.00, HTSUS, as other articles of zirconium. The rate of duty is 5.1 percent *ad valorem*.

APPLICABILITY OF SUBHEADING 9802.00.60

Subheading 9802.90.60, HTSUS, provides a partial duty exemption for:

> [any] article of metal (as defined in U.S. note 3(d) of this subchapter) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

This tariff provision imposes a dual "further processing" requirement on eligible articles of metal; one foreign, and when returned, one domestic. Metal articles satisfying these statutory requirements may be classified under this tariff provision with duty only on the value of such processing performed outside the U.S., provided the documentary requirements of section 10.9, Customs Regulations (19 CFR 10.9), are satisfied.

Pursuant to U.S. Note 3(d) of subchapter II, Chapter 98, the term "metal" covers:

> (1) the base metals enumerated in additional U.S. note 1 to section XV; (2) arsenic, barium boron, calcium, mercury, selenium, silicon, strontium, tellurium, thorium, uranium and the rare-earth elements; (3) and alloys of any of the foregoing.

As the Trex material is an alloy of "zirconium", a base metal enumerated in additional U.S. Note 1, Section XV, HTSUS, the Trex material is an eligible article of metal for purposes subheading 9802.00.60, HTSUS. Moreover, as the Trex is manufactured in the U.S. from U.S. origin zirconium sand it satisfies the initial requirement under this tariff provision that the metal must be manufactured in the U.S. or be subjected to a process of manufacture in the U.S.

Clearly the processing operations performed in Germany to manufacture the zirconium tubes (cold pilgering, annealing, etching, straightening, blasting, polishing and cutting to length) constitute sufficient "further processing" so as to satisfy the foreign "further processing" requirement of subheading 9802.00.60, HTSUS. *See*, HQ 556123 dated July 30, 1991 (holding that steel plates subjected to cutting, and forming operations are considered "further processing" under subheading 9802.00.60, HTSUS). *See* HQ 555103 dated February 2, 1989 (holding that a stainless steel article subjected to a heat treatment process known as "Solution (water) Quench, Annealed" which was designed to relieve rolling stress constituted a "further processing" operation. In this case, as in the cited rulings, the processing operations performed to the Trex impart new and different characteristics to the Trex (they have changed in shape and form) which did not exist in the Trex prior to the processing.

It next must be determined whether the domestic processing of the zirconium tubes in the U.S. satisfies the domestic "further processing" requirement of subheading 9802.00.60.

You assert that the GTAW operation which is performed in the U.S. by Siemens to manufacture the fuel rods constitutes sufficient "further processing" so as to satisfy the domestic "further processing" requirement of subheading 9802.00.60, HTSUS.

In C.S.D. 84–49, 18 Cust. Bull. 957 (1983) we stated that:

> [f]or purposes of item 806.30 TSUS [the predecessor tariff to HTSUS subheading 9802.00.60], the term 'further processing' has reference to processing that changes the shape of the metal or imparts new and different characteristics which become an integral part of the metal itself and which did not exist in the metal before processing; thus, further processing includes machining, grinding, drilling, threading, punching,

> forming, plating, and the like, but does not include painting or the mere assembly of finished parts by bolting, *welding,* etc. (Emphasis added).

You argue that the statement in C.S.D. 84–49, that "the mere assembly of finished parts by * * *, welding, etc." would not constitute "further processing" is clearly in error, because there are some types of welding operations, such as the GTAW operation performed in this case, which do constitute further processing of the metal as required under subheading 9802.00.60. We agree for the reasons stated below.

In *Intelex Systems, Inc. v. United States,* 59 CCPA 138, C.A.D. 1055 (1972), the court discussed the type of processing that would entail "further processing". In the *Intelex* case, copper wire and insulating paper were processed into lead-covered telephone cable and imported into the U.S. on cable rolls. The cable was then merely strung on poles after wire stripping and splicing operations. The issue presented was whether the imported cable was "returned to the U.S. for further processing," within the meaning of paragraph 1615(g)(2)(B), Tariff Act of 1930, as amended (a precursor provision of subheading 9802.00.80, HTSUS). The court considered the words "process" and "processing" and stated that:

> * * * its meaning must be controlled by the particular context in which it is used here and the legislative intent. *Fleming v. Hawkeye Pearl Button Co.,* 113 F. 2d 52, 57 (8th Cir. 1940). When we look to the context of paragraph 1615(g)(2), we do not think that Congress had in mind that any and all kinds of 'processing' would suffice to bring the article within the purview of that paragraph. Instead, we believe that the words 'further processing' relate to the kind of processing to which the article had been subjected before—namely, 'a process of manufacture,' as expressed in paragraph 1615(g)(2)(A). We continue of the view that Congress used the expression "subjected to a process of manufacture' as synonymous with 'processing' *A. F. Burstrom v. United States,* 44 CCPA 27, CAD 631 (1956), and that the 'further processing' referred to in paragraph 1615(g)(2)(A) is a further manufacturing process. (Court's emphasis).

The court stated that it did "* * * not think that the processes to which an already completed article were subjected, incident to using it for the purpose intended, were necessarily part and parcel of manufacturing processes performed on that article." (Court's emphasis). Therefore, finding no evidence that the operations performed in the U.S. on the imported telephone cable constituted a process of manufacture in any common or commercial sense, the court determined that the partial duty exemption was inapplicable to the imported cable.

Unlike the court's finding in *Intelex,* we find that sufficient evidence has been presented to support a finding that the GTAW operation which is performed on the zirconium tubes, in this case, does constitute a process of manufacture "in a common or commercial sense" in satisfaction of the "further processing" requirement under subheading 9802.00.60.

The GTAW operation creates a physical change on the imported tubes by melting them at the point of the weld. *See, ASM Metals Reference Book,* Second Edition, published by the American Society for Metals, which defines welding as "joining two or more pieces of material by applying heat or pressure, or both, with or without filler material, to produce a localized union through fusion or recrystallization across the interface". Also, this fusion or recrystallization effects the molecular characteristics of the zirconium tube at the point of the weld in that

> When a liquid (or pure molten) metal begins to solidify or freeze, atoms begin to take up their positions in the appropriate lattice at various spots or nuclei in the molten metal. * * * Eventually these arms meet arms of neighboring crystals and no further growth outwards can take place. The crystal then increases in size, within its boundary, forming a solid crystal, and the junction where it meets the surrounding crystals becomes the crystal of grain boundary. Its shape will now be quite unlike what it would have been if it could have grown without restriction; hence it will have no definite shape. A.C. Davies, *The Science and Practice of Welding,* Eighth Edition, Volume 1.

The form of the zirconium tube also changes as a result of the GTAW operation in that the point of the weld between the tube and the lower and upper end cap can be viewed as a tiny casting itself.

> As the amount of solid metal increases, of course, the amount of liquid metal decreases proportionately, and the grains grow larger and larger until they ultimately meet. Where the grains meet produces a disarrayed arrangement of atoms called a grain boundary which is naturally irregular. * * * The grain boundaries of an ingot which has been cast in a cylindrical mold is much the same as in a weld, and because of the

similarity in the shape of its grains, *a fusion weld can be viewed as a tiny casting.* (Emphasis added). American Welding Society, *Welding Handbook,* Seventh Edition, Volume 1, "Fundamentals of Welding".

Based on the above considerations, we find that the GTAW operations performed in the U.S. by Siemens, in the manner described above, to manufacture nuclear fuel rods constitute "further processing" of the imported zirconium tubes. Thus, the GTAW operation, as described above, satisfies the domestic "further processing" requirements of subheading 9802.00.60, HTSUS. Accordingly, the imported zirconium tubes are eligible for the partial duty exemption available under subheading 9802.00.60 provided the documentation requirements of 19 CFR 10.9 are satisfied.

Holding:

Under the authority of GRI 1, the zirconium tubes, as described, are provided for in heading 8109. They are classifiable in subheading 8109.90.00, HTSUS, as other articles of zirconium. The rate of duty is 5.1 percent *ad valorem.*

Based on our review of the information submitted, we find that the processes performed in Germany to the U.S. origin Trex material satisfy the foreign "further processing" requirement. In addition, the GTAW operations performed in the U.S. to the imported zirconium tubes, as described above, satisfy the domestic "further processing" requirement for purposes of subheading 9802.00.60, HTSUS. Therefore, the imported zirconium tubes subjected to the operations described above are eligible for the partial duty exemption under this tariff provision with duty only upon the cost or value of such processing performed outside the U.S., upon compliance with the documentary requirements of 19 CFR 10.9.

C.S.D. 84–49 is modified in accordance with this ruling to reflect that GTAW constitutes "further processing" for purposes of subheading 9802.00.60, HTSUS. Whether other types of welding operations, other than GTAW, constitute "further processing" for purposes of subheading 9802.00.60, will be determined on a case-by-case basis.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF COATED POLYPROPYLENE FABRIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation and modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to respectively revoke and modify two rulings pertaining to the tariff classification of coated polypropylene fabric. Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before March 15, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification and Appeals Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification and Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Branch, (202) 482–7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to respectively revoke and modify two rulings pertaining to the tariff classification of coated polypropylene fabric.

In New York Ruling, Letter (NYRL) 891702, dated November 19, 1993, fabric made of woven polypropylene strip laminated with clear polypropylene was classified by the Customs port at New York under subheading 5407.20.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "[W]oven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404, woven fabrics obtained from strip or the like. This ruling letter is set forth in "Attachment A."

The determinative issue in the instant case is whether the subject fabric is classifiable as a coated fabric of heading 5903, HTSUSA. Chapter Note 2(a)(1) to Chapter 59 states that heading 5903 precludes: "[F]abrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color."

The sole criterion upon which Customs is to determine whether fabric is coated for purposes of classification under heading 5903, HTSUSA, is based on visibility: coated fabric is classifiable in this heading if the coating is visible to the naked eye. In the instant analysis, examination of the subject fabrics yields the finding that they are visibly coated with plastic. The translucent plastic laminate is manually separable from the underlying woven polypropylene strip on all three of the subject fabrics. It is on this basis that Customs deems the subject fabrics visibly coated.

Customs intends to revoke NYRL 891702 to reflect proper classification of the coated polypropylene fabric in subheading 5903.90.2500, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 958702, which

serves to revoke NYRL 891702, is set forth in "Attachment B" to this document.

On November 2, 1995, Customs issued HRL 958462 in which four styles of plastic coated fabric were classified under subheading 5903.90.2500, HTSUSA. This ruling letter is set forth in "Attachment C." After the issuance of that ruling, Customs learned that the recipient of HRL 958462 was also the recipient of NYRL 891702, dated November 19, 1993, in which three of the identical fabrics at issue in HRL 958462 were classified under subheading 5407.20.0000, HTSUSA. The issuance of a *de novo* binding classification ruling was inappropriate where the recipient had previously been issued a conflicting, unrevoked ruling on identical merchandise. HRL 958462 should have been issued as a revocation of NYRL 891702 pursuant to the requirements of section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057). Accordingly, HRL 958462 is modified. The classification of the 3.0, 6.5 and 8.0 ounce coated polypropylene fabrics set forth in HRL 958462 is revoked as these fabrics were previously classified in NYRL 891702. The classification of the 5.0 ounce fabric set forth in HRL 958462 remains unmodified inasmuch as this fabric was not previously classified in NYRL 891702. As stated *supra,* Customs intends to revoke NYRL 891702 to reflect proper classification of the 3.0, 6.5 and 8.0 ounce coated polypropylene fabric in subheading 5903.90.2500, HTSUSA. Proposed HRL 958703, which serves to modify HRL 958462, is set forth in "Attachment D" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 24, 1996.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 19, 1993.

CLA–2–54:S:N:N6:352 891702
Category: Classification
Tariff No, 5407.20.0000

INTERNATIONAL CUSTOMS SERVICES
7100 San Bernardo
Laredo, TX 78044

Re: The tariff classification of polypropylene woven fabric from Mexico.

DEAR MR. QUIROZ:

In your letter dated October 20, 1993, on behalf of your client Marino Technologies, Inc., you requested a classification ruling.

You have submitted a representative sample of plain woven fabric that is composed of 100% polypropylene. This merchandise is woven with polypropylene strips that measure approximately 2 millimeters (mm) in width. Your correspondence indicates the fabric is laminated with clear polypropylene. Your letter of inquiry states you intend to import three different weights of this material. All three fabrics include coating that weighs approximately 21 g/m2. The fabric designated as No. 1, weighs 112 g/m2, and contains 10.2 strips per inch in the warp and 10.2 strips per inch in the filling. Fabric No. 2, weighs 271 g/m2 and it contains 12 strips per inch in the warp and 11.2 strips per inch in the filling. Fabric No. 3, weighs 298 g/m2 and it contains 13 strips per inch in the warp and 13 strips per inch in the filling.

Your correspondence further states that in your opinion this merchandise should be classified under Harmonized Tariff Schedules of the United States (HTS), 5903.90.2500.

Note 2 to Chapter 59, HTS, defines the scope of heading 5903, under which textile fabrics which are coated, covered, impregnated, or laminated are classifiable. Note 2 states that heading 5903, HTS, applies to:

(A) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the weight of the plastic material (compact or cellular), other than:

(1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapter 50 to 55, 58 or 60); for the purpose of this provision no account should be taken of any resulting change of color; Since the polypropylene coating on this fabric is not visible to the naked eye, it is not classifiable in heading 5903, HTS.

The applicable subheading for the three different weights of polypropylene woven fabric will be 5407.20.0000, HTS, which provides for woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404, woven fabrics obtained from strip or the like. The duty rate will be 17 percent *ad valorem*.

These woven fabrics fall within textile category designation 620. Based upon international textile trade agreements, products of Mexico are subject to visa requirements. The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

RR:TC:TE 958702 SIC
Category: Classification
Tariff No. 5903.90.2500

RAFAEL QUIROZ, JR.
INTERNATIONAL CUSTOMS SERVICES
7100 San Bernardo, Ste. 307
P.O. Box 3259
Laredo, TX 78044

Re: Revocation of NYRL 891702 (11/19/93); classification of coated fabric; Note 2(a)(1) to Chapter 59; heading 5903, HTSUSA; coating rendered visible to the naked eye if manually separable from underlying fabric.

DEAR MR. QUIROZ:

On November 19, 1993, the New York port issued you New York Ruling Letter (NYRL) 891702 in which Customs classified three different weights of coated fabric under subheading 5407.20.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon reconsideration, this office deems that classification to be in error. Our analysis follows.

Facts:

The merchandise at issue in NYRL 891702 consists of three different weights of woven fabric made of polypropylene material laminated on one side with a thin, clear film of polypropylene plastic. The specifications of the subject materials are as follows:

1. Fabric Construction:

100% Polypropylene Material
3.0 oz. 10.2 × 10.2 threads/inch
6.5 oz. 12.0 × 11.2 threads/inch
8.5 oz. 13.0 × 13.0 threads/inch

2. Weights of Coating/Laminating Substances:

3.0 oz. coating	= 21	grams/square meter
fabric	= 91	grams/square meter
6.5 oz. coating	= 21	grams/square meter
fabric	= 250	grams/square meter
8.5 oz. coating	= 21	grams/square meter
fabric	= 277	grams/square meter

3. Weights of Coated Fabric Per Square Meter:

3.0 oz.	= 112	grams/square meter
6.5 oz.	= 271	grams/square meter
8.5 oz.	= 298	grams/square meter

This office is in possession of samples of all three fabric weights in both their coated and uncoated states. The strips of all materials, both coated and uncoated, are of a high saturation white hue with shiny surface. The strips are somewhat translucent and have been crimped or folded from wider widths giving them a certain degree of thickness.

Issue:

Whether the coating on the subject fabrics is visible to the naked eye so as to warrant classification under heading 5903, Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be

in accordance with the terms of the headings and any relevant section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied in the order of their appearance.

Heading 5903, HTSUSA, provides for "[T]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902." Chapter Note 2(a)(1) to Chapter 59 states that heading 5903 precludes:

> "[F]abrics in which the impregnation coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color."

The sole criterion upon which Customs is to determine whether fabric is coated for purposes of classification under heading 5903, HTSUSA, is based on visibility: coated fabric is classifiable in this heading if the coating is visible to the naked eye. This standard does not allow the examiner to take the "effects" of coating into account. Coating will often result in a change of color, or increase a fabric's stiffness; these are factors which, while indicative of the presence of a coating, may not be taken into account in determining whether the plastic itself is visible to the naked eye.

In the instant analysis, examination of the subject fabrics yields the finding that they are visibly coated with plastic. The translucent plastic laminate is manually separable from the underlying woven polypropylene strip on all three of the subject fabrics. It is on this basis that Customs deems the subject fabrics visibly coated.

Holding:

NYRL 891702 is revoked.

The three fabric weights are classifiable under subheading 5903.90.2500, HTSUSA, which provides for "[T]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: other: of man-made fibers: other: other," dutiable at a rate of 8.4 percent *ad valorem*. The textile quota category is 229.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at a local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact a local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

All future requests for binding classification rulings concerning plastic coated fabrics should be accompanied by samples of the subject fabric in both their coated and uncoated states.

In accordance with section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, November 2, 1995.

CO:R:C:T 958462 SK
Category: Classification
Tariff No. 5903.90.2500

RAFAEL QUIROZ, JR.
INTERNATIONAL CUSTOMS SERVICES
7100 San Bernardo, Suite 307
P.O. Box 3259
LAredo, TX 78044

Re: Classification of coated fabric; Note 2(a)(1) to Chapter 59; heading 5903, HTSUSA; coating visible if separable from underlying fabric; HRL 953937 (12/17/93); 956772 (12/9/94); 953937 (12/17/93); 956946 (4/6/95).

DEAR MR. QUIROZ:

This is in response to your letter of September 20, 1995, in which you request a binding classification ruling for four weights of woven coated fabric. Your request is made on behalf of four importers: Marino Technologies of Opa-Locka, Florida; Ricketts Bags of Tampa, Florida; Polytex Fibers of Houston, Texas; and Dewitt Co. of Sikestown, Missouri. With the exception of the 5.0 ounce fabric, these same fabrics were the subject of Headquarters Ruling Letter (HRL) 956946, issued to you on behalf of your client, Cady Bag Co. of Pearson, Georgia, on April 6, 1995. Coated and uncoated samples of each fabric weight were submitted to this office for examination.

Facts:

The subject merchandise consists of four different weights of woven fabric made of polypropylene material that is laminated on one side with a thin, clear film of polypropylene plastic. The specifications of the subject materials are as follows:

1. Fabric Construction:

100% Polypropylene Material
3.0 oz. 10.2 × 10.2 threads/inch
6.5 oz. 12.0 × 11.2 threads/inch
5.0 oz. 11.8 × 10.0 threads/inch
8.5 oz. 13.0 × 13.0 threads/inch

2. Weights of Coating/Laminating Substances:

3.0 oz. coating	= 21	grams/square meter
fabric	= 91	grams/square meter
5.0 oz. coating	= 37	grams/square meter
fabric	= 200	grams/square meter
6.5 oz. coating	= 21	grams/square meter
fabric	= 250	grams/square meter
8.5 oz. coating	= 21	grams/square meter
fabric	= 277	grams/square meter

3. Weight Per Square Meter:

3.0 oz.	= 112	grams/square meter
5.0 oz.	= 237	grams/square meter
6.5 oz.	= 271	grams/square meter
8.5 oz.	= 298	grams/square meter

Samples of all four fabric weights were submitted to this office in both their coated and uncoated states. The strips of all materials, both coated and uncoated, are of a high saturation white hue with shiny surface. The strips are somewhat translucent and have been crimped or folded from wider widths giving them a certain degree of thickness.

Issue:

Whether the coating on the subject fabrics is visible to the naked eye so as to warrant classification under heading 5903, Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be in accordance with the terms of the headings and any relevant section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied in the order of their appearance.

Heading 5903, HTSUSA, provides for "[T]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902." Chapter Note 2(a)(1) to Chapter 59 states that heading 5903 precludes:

> "[F]abrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color."

As noted *supra*, heading 5903 provides for only those fabrics which are visibly coated. If, upon unaided visual examination, there is the suggestion of the presence of plastic coating, it is then within Customs' discretion to examine the fabric under magnification. *See* HRL 082644 of March 2, 1990.

The sole criterion upon which Customs is to determine whether fabric is coated for purposes of classification under heading 5903, HTSUSA, is based on visibility: fabrics coated and is classifiable in this heading if the plastic coating is visible to the naked eye. This standard does not allow the examiner to take the "effects" of plastic coating into account. Plastic coating will often result in a change of color, or increase a fabric's stiffness; these are factors which, while indicative of the presence of plastic, may not be taken into account in determining whether the plastic itself is visible to the naked eye.

In the instant analysis, examination of the subject fabrics yields the finding that they are visibly coated with plastic. The translucent plastic laminate is manually separable from the underlying woven polypropylene strip on all four of the subject fabrics. It is on this basis that Customs deems the subject fabrics visibly coated.

Holding:

The four fabric weights at issue are classifiable under subheading 5903.90.2500, HTSUSA, which provides for "[T]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: other: of man-made fibers: other: other," dutiable at a rate of 8.4 percent *ad valorem*. The textile quota category is 229.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent, renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at a local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact a local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

All future requests for binding classification rulings concerning plastic coated fabrics should be accompanied by samples of the subject fabric in both its coated and uncoated states.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

RR:TC:TE 958703 SK
Category: Classification
Tariff No. 5903.90.2500

RAFAEL QUIROZ, JR.
INTERNATIONAL CUSTOMS SERVICES
7100 San Bernardo, Suite 307
P.O. Box 3259
Laredo, TX 78044

Re: Modification of HRL 958462 (11/2/95); issuance of a *de novo* binding classification ruling inappropriate where the recipient previously was issued a conflicting unrevoked ruling on the identical merchandise; coated fabric.

DEAR MR. QUIROZ:

On November 2, 1995, this office issued you Headquarters Ruling Letter (HRL) 958462 in which Customs classified four styles of plastic coated fabric under subheading 5903.90.2500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Since the issuance of that ruling, it has come to our attention that you were also the recipient of New York Ruling Letter (NYRL) 891702, dated November 19, 1993, in which Customs classified three of the four coated fabrics at issue in HRL 958462 under subheading 5407.20.0000, HTSUSA. As NYRL 891702 had not been revoked at the time of issuance of HRL 958462, and Customs had since reconsidered the classification of the subject merchandise set forth in NYRL 891702, HRL 958462 should have been issued as a revocation of NYRL 891702 pursuant to the requirements of section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057).

Accordingly, HRL 958462 is partially modified. The classification of the 3.0, 6.5 and 8.0 ounce coated polypropylene fabrics set forth in HRL 958462 is revoked as these fabrics were previously classified in NYRL 891702. Please be advised that the classification of the 5.0 ounce fabric set forth in HRL 958462 remains unmodified inasmuch as this fabric was not previously classified in NYRL 891702. NYRL 891702 will be revoked in conformance with section 625(c)(1), cited above, and the classification of the 3.0, 6.5 and 8.0 ounce fabrics will be set forth therein. The revocation of NYRL 891702 will be referenced HRL 958702.

In accordance with section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WALL SHELF/TOWEL RACK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a chrome-plated steel and glass wall shelf/towel rack. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or March 15, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, Metals and Machinery Classification Branch (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a chrome-plated steel and glass wall shelf/towel rack. Comments are invited on the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) 813420 dated August 18, 1995, a chrome-plated steel and glass wall shelf/towel rack was classified under subheading 7324.90.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides, in pertinent part, for sanitary ware and parts thereof, of iron or steel, other. NYRL 813420 is set forth as "Attachment A" to this document.

We are of the opinion that subheading 8302.50.00, HTSUS, which provides, in pertinent part, for hat-racks, hat pegs, brackets and similar fixtures, more specifically describes the article.

Customs intends to revoke NYRL 813420 to reflect the proper classification of the chrome-plated steel and glass wall shelf/towel rack under

subheading 8302.50.00, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 958421 revoking NYRL 813420 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 25, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 18, 1995.

CLA–2–73:S:N:N3:113 813420
Category: Classification
Tariff No. 7324.90.0000

MS. JACQUELINE A. BONACE
BLAIR CORPORATION
220 Hickory Street
Warren, PA 16366–0001

Re: The tariff classification of a wall shelf from Taiwan.

DEAR MS. BONACE:

In your letter dated July 27, 1995, you requested a tariff classification ruling.

The merchandise is item number 742501, a bathroom wall shelf. It is constructed of chrome-plated steel with two glass shelves. The shelf also features a stationary towel bar, a swivel towel bar, and a ring to hold a blow dryer.

The applicable subheading for the wall shelf will be 7324.90.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for sanitary ware and parts thereof, of iron or steel, other. The duty rate will be 2.7 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA RR:TC:MM 958421 MMC
Category: Classification
Tariff No. 8302.50.00

MS. JACQUELINE A. BONACE
BLAIR CORPORATION
220 Hickory Street
Warren, PA 16366–0001

Re: NYRL 813420 revoked; wall shelf/towel rack; ENs 73.24, 83.02; HRL 957427.

DEAR MS. BONACE:

This is in reference to your letter of September 5, 1995, on behalf of Blair Corporation, requesting reconsideration of New York Ruling Letter (NYRL) 813420 issued to you by the Area Director of Customs, New York Seaport, on August 18, 1995, concerning the classification of a chrome plated steel and glass wall shelf/towel rack under the Harmonized Tariff Schedule of the United States (HTSUS). A sample of the article was submitted for our examination.

In NYRL 813420, you were advised that item # 742501 was classified under subheading 7324.90.00, HTSUS, which provides for sanitary ware and parts thereof; of iron or steel, other. You believe that item # 742501 could be considered a towel rack classifiable under subheading 8302.50.00, HTSUS, as hat-racks, hat pegs, brackets and similar fixtures, and parts thereof.

Facts:

The subject article is constructed of a chrome-plated steel frame which consists of 3 bars each measuring approximately 2' long, 4 wall mounts, a shelf frame used to support a glass shell; a round movable "towel bar", a ring to support a hair dryer, and a smaller movable towel bar. The frame is constructed in an "H" like shape. The horizontal stationary towel bar is attached to the vertical bars approximately 3½" from the top of the bars and the glass shelf frame approximately 3½" from the bottom. A wall mount is attached to the top and bottom of each of the vertical bars. The other attachments are mounted to the vertical bars.

Issue:

Is item # 742501 classifiable as a towel rack under subheading 8302.50.00, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The subheadings under consideration are as follows:

7324.90.00	Sanitary ware and parts thereof; of iron or steel: Other, including parts
8302.50.00	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof hat-racks, hat pegs, brackets and similar fixtures, and parts thereof

In an effort to determine if the subject article is provided for under each heading, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). En 73.24, pg. 1036–1037, states in pertinent part, that:

> This heading comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for sanitary purposes.
>
> These articles may be cast, or of iron or steel sheet, plate, hoop, strip, wire, wire grill, wire cloth, etc., and may be manufactured by any process (moulding, forging, punch-

ing, stamping, etc.). They may be fitted with lids, handles or other parts or accessories of other materials **provided** that they retain the character of iron or steel articles.

The heading includes, baths, bidets, hip-baths, foot-baths, sinks, wash basins, toilet sets) soap dishes and sponge baskets; douche cans, sanitary pails, urinals, bedpans, chamber-pots, water closet pans and flushing cisterns whether or not equipped with their mechanisms, spittoons, toilet paper holders.

The heading excludes:

(a) Cans, boxes and similar containers of **heading 73.10.**
(b) Small hanging medicine and toilet wall cabinets and other furniture of **Chapter 94.**

EN 83.02, pg. 1118, states in pertinent part, that this heading covers:

(G) hat-racks, hat-pegs, brackets (fixed, hinged or toothed, etc.) and similar fixtures such as coat racks, towel racks, dish-cloth racks, brush racks, key racks.

According to the ENs, the subject article is described by both headings. Inasmuch as the subject article is *prima facie* described in two different headings, it cannot be classified according to GRI 1. When goods cannot be classified by applying GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's are applied.

GRI 3 states, in pertinent part, that when goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

EN 83.02 clearly indicates that towel racks are described in heading 8302. Alternatively, EN 73.24 merely provides for all "sanitary" articles, which are not more specifically covered by other headings. In Headquarters Ruling Letter 957427 dated December 29, 1994, another wall shelf with towel bars was classified under subheading 8302.50.00, HTSUS.

We are of the opinion that subheading 8302.50.00, HTSUS, provides the most specific description of the wall shelf/towel rack. Therefore, it is classifiable under that subheading.

Holding:

The wall shelf with towel bars, item # 742501, is classifiable under subheading 8302.50.00, HTSUS, as base metals hat racks, hat-pegs, bracket and similar fixtures with a column one duty rate of 2% *ad valorem*. NYRL 813420 dated August 18, 1995, is revoked.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF PORTABLE BAR CODE SCANNING DEVICES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of portable bar code scanning devices. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before March 15, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Branch, Tariff Classification Appeals Division, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of portable bar code scanning devices.

In New York Ruling Letter (NY) 894422, issued by the Area Director of Customs, New York Seaport, on February 7, 1994, the PDF 1000 hand-held scanner was held to be classifiable under subheading 8471.92.84, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other input units for ADP machines. Plastic housings for the PDF 1000 were classified under subheading 8473.30.50, HTSUS, which provides for other parts and accessories of the machines of heading 8471 HTSUS. In NY 896418, issued by the Area Director of Customs, New York Seaport, on April 6, 1994, the LS 2000II hand-held scanner, which was principally used with point-of-sale devices, was held

to be classifiable under subheading 8473.29.00, HTSUS, which provides for parts and accessories of the machines of heading 8470, HTSUS (cash registers). NY 894422 is set forth in Attachment A to this document. NY 896418 is set forth in Attachment B to this document.

Customs Headquarters is of the opinion that the portable bar code scanning devices are classifiable under subheading 9013.80.60, HTSUS, which provides for other optical appliances and instruments, not specified or included elsewhere in this chapter. Thus, according to note 1(m) to section XVI, HTSUS, they cannot be classified under a section XVI heading. Parts for these devices are classifiable under subheading 9013.90.40, HTSUS. Customs intends to revoke NY 894422 and NY 898418 to reflect the proper classification of the portable bar code scanning devices and parts thereof under these provisions. Proposed Headquarters Ruling Letter 956605, which concerns the classification of similar scanning devices, revoking NY 894422 and NY 896418, is set forth in Attachment C to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 29, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 7, 1994.

CLA–2–84:S:N:N1:110 894422
Category: Classification
Tariff No. 8471.92.3400 and 8473.30.5000

MS. ANN MARIE DOWLING
SEINO AMERICA, INC.
147–60 175th Street
Jamaica, NY 11434

Re: The tariff classification of a PDF 1000 Portable Data File Scanning device and the plastic housing for this unit from the Netherlands.

DEAR MS. DOWLING:

In your letter dated January 25, 1994, on behalf of Symbol Technologies, Inc., you requested a tariff classification ruling.

The merchandise under consideration involves a hand-held data scanning device that is used in inventory control, manufacturing, quality control, asset tracking, and identification card tracking.

The PDF 1000 is capable of reading and decoding more than a kilobyte of data in a subsecond, and is the first scanning system capable of reading PDF417, the innovative, two

dimensional symbology that can encode complete data files. It can communicate with a wide range of personal computers and terminals with a single or dual port RS–232C interface. The PDF 1000 scanner incorporates a resonant scan element that generates a "raster" scan pattern. This pattern automatically scans the PDF417 symbol both horizontally and vertically.

Noting Legal Note 5 (B) to Chapter 84 of HTS, this scanning device would appear to meet the definition of a "unit" of an ADP system, since it is connectable to the central processing unit either directly or through one or more other units, and is specifically designed as part of such a system and be able to accept or deliver data in a form (code or signal) which can be used by the system.

The plastic housing for this unit appears to be specially designed and principally used with this data scanner.

The applicable subheading for the PDF 1000 portable Data File Scanner will be 8471.92.8400, Harmonized Tariff Schedule of the United States (HTS), which provides for other input units, optical scanners and magnetic ink recognition devices. The rate of duty will be 3.7 percent *ad valorem*.

The applicable subheading for the plastic housing will be 8473.30.5000, HTS, which provides for other parts and accessories of the machines of heading 8471. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 6, 1994.

CLA–2–84:S:N:N1:110 896418
Category: Classification
Tariff No. 8473.29.0000

MS. ANN MARIE DOWLING
SEINO AMERICA, INC.
147–60 275th Street
Jamaica, NY 11434

Re: The tariff classification of a model LS 2000II scanner from Japan.

DEAR MS. DOWLING:

In your letter dated March 29, 1994, you requested a tariff classification ruling.

The merchandise under consideration involves a model LS 200011 series scanner that is a hand-held bar code scanner. This device features an extended depth of field of up to 35 inches (90cm) for scanning bar codes whether low contrast or high density symbols, without sacrificing close contact reading. This scanner uses bidirectional, retrocollective scanning technology, incorporates a 675 mm laser diode light source, and can scan 36 scans per second. This "point-and shoot" scanner is 5.8 inches in height, 4.9 inches in length, and 2.6 inches in width.

Based on information provided by the inquirer this scanner appears to be principally designed and used with point-of-sale units and cash registers in retail establishments. while its principal use and design is for POS units it is capable of direct interconnection to a host computer for such uses as sales ordering, and inventory control.

The applicable subheading for the LS 2000II scanner will be 8473.29.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other parts and accessories of the machines of heading 8470. The rate of duty will be 3.9 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 956605 LTO
Category: Classification
Tariff No. 9013.90.40

MR. LAURENCE J. LASOFF
MR. JOHN B. BREW
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W.
Suite 400
Washington, DC 20007

Re: Portable bar code scanning devices; LS 8100II infrared scanner; LS 8500 visible laser diode scanner; plastic housings; HQs 088941, 089005, 952992, 953516, 954255, 955114, 955599; NYs 894422, 896418 *revoked;* heading 8471; section XVI, note 1(m); section XVI, note 2(a); chapter 90, note 2(a); chapter 90, additional U.S. note 3.

DEAR MR. LASOFF AND MR. BREW:

This is in response to a letter from Seino America, Inc., of June 9, 1994, requesting, on behalf of Symbol Technologies, Inc., the classification of plastic housings for the LS 8100II Infrared Scanner and LS 8500 Visible Laser Diode Scanner under the Harmonized Tariff Schedule of the United States (HTSUS). In preparing this decision, we have also considered several supplemental submissions, including your submission dated December 27, 1994.

Facts:

The articles in question are plastic housings for the LS 8100II Infrared Scanner (LS 8100) and LS 8500 Visible Laser Diode Scanner (LS 8500). The LS 8000 series (which includes the LS 8100 and LS 8500) scanners are bar code data capture devices. These devices use a laser scanner to read a bar code symbol. In application, a beam from a laser diode hits a mirror, which oscillates back and forth. This oscillation cause the beam (then a dot of light) to form a scan line, which is sent through the scanners "exit window." The scan line hits the bar code, and the white spaces in the bar code reflect the beam back into the "exit window." The beam then hits another, specially-shaped portion of the mirror, which reflects the beam into a photodiode, after which the signal gets converted into one the computer can use.

The LS 8000 series scanners can operate with virtually any computer system or terminal. The LS 8100 is particularly suited for use in applications where black and white symbols are most often found, while the LS 8500 is suitable for all retail environments and applications where the ability to read all colors and substrates is desired.

Issue:

Whether the housings for the LS 8100 and LS 8500 are classifiable as parts of ADP units under heading 8473, HTSUS, or as parts of optical appliances or instruments under heading 9013, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that "for legal purposes, classi-

fication shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

Because the plastic housing is a specially designed part of the LS 8000 series scanners and is not a "good included" in any chapter 84, 85 or 90 heading, it is necessary to determine the classification of those scanners. *See* section XVI, note 2(a); chapter 90, note 2(a), HTSUS. The headings at issue are as follows:

8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included
9013	Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof

Heading 8471, HTSUS, is included within section XVI, HTSUS. Note 1(m) to section XVI states that this section, does not cover articles of chapter 90. Further, the merchandise covered by heading 8471, HTSUS, is not excluded from chapter 90 by note 1 to chapter 90, HTSUS (unlike, for example, the pumps incorporating measuring devices of heading 8413, HTSUS, which cannot be classified in chapter 90). Thus, if the LS 8000 series scanners are classifiable within chapter 90, HTSUS (specifically under heading 9013, HTSUS), they cannot be classified as units for automatic data processing (ADP) machines, or as optical readers, not elsewhere specified or included, under heading 8471, HTSUS.

Additional U.S. note 3 to chapter 90, HTSUS, defines the terms *"optical appliances"* and *"optical instruments"* for the purposes of chapter 90, as follows:

> appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

In HQ 088941, dated January 16, 1992, Customs, citing *Webster's II New Riverside University Dictionary* (1984), pg. 1155, defined "subsidiary" as follows: "[s]erving to supplement or assist * * * [s]econdary in importance: subordinate." We further stated that "[t]he meaning of 'subsidiary' has nothing to do with the amount of time optics are used in the overall use of a device, but it relates more to the type of task which the optics perform when being used in the operation of the device."

The laser scanners incorporate a mirror that plays a vital role in the functioning of the laser scanner. The mirror, which oscillates back and forth, causes the beam (then a dot of light) to form a scan line. The scan line hits the bar code, and the white spaces in the bar code reflect the beam back into the scanner. Another portion of the mirror then reflects the beam into a photodiode, after which the signal gets converted into one the computer can use.

The scanner's mirror assists in both the production of the scan line and the production of the signal. It is therefore our opinion that the mirror is not "secondary in importance" or "subordinate." For rulings concerning devices that contained a single optical element that were, classified as "optical" instruments within the HTSUS, *see* HQ 955599, dated October 31, 1994 (laser pointer containing a lens); HQ 955114, dated October 19, 1993 (laser diode module containing a focusing lens); HQ 953516, dated July 1, 1993 (laser pointer containing a lens); HQ 954255, dated June 8, 1993 (optical isolators containing a miniature glass polarizer); HQ 089005, dated July 26, 1991 (pocket tele-microscope containing a plastic lens). Accordingly, the scanners are "optical instruments" for tariff purposes, and are classifiable under subheading 9013.80.60, HTSUS, which provides for other optical appliances and instruments, not specified or included elsewhere in chapter 90. *See* HQ 952992, dated December 11, 1992 (wherein a barcode reader containing a plastic lens, which operated "under the same principle as the barcode scanner used in supermarket check out lines," was also classified under subheading 9013.80.60, HTSUS). The plastic housings, which are used solely with the LS 8100 and LS 8500, are classifiable as parts under subheading 9013.90.40, HTSUS, which provides for other parts for optical appliances and instruments.

In NY 894422, issued by the Area Director of Customs, New York Seaport, on February 7, 1994, the PDF 1000 hand-held scanner was held to be classifiable under subheading 8471.92.84, HTSUS, which provides for other input units for ADP machines. Plastic housings for the PDF 1000 were classified under subheading 8473.30.50, HTSUS, which provides for other parts and accessories of the machines of heading 8471, HTSUS. In NY 896418, issued by the Area Director of Customs, New York Seaport, on April 6, 1994, the LS 2000II hand-held scanner, which was principally used with point-of-sale devices, was held

to be classifiable under subheading 8473.29.00, HTSUS, which provides for parts and accessories of the machines of heading 8470, HTSUS (cash registers). As the PDF 1000 and LS 2000II are similar to the LS 8000 series scanners, NY 894422 and NY 896418 are revoked.

Holding:

The plastic housings for the LS 8100II Infrared Scanner and LS 8500 Visible Laser Diode are classifiable under subheading 9013.90.40, HTSUS, which provides for other parts for optical appliances and instruments, The corresponding rate of duty for articles of this subheading is 8.1% *ad valorem*.

Effect on Other Rulings:

NY 894422, dated February 7, 1994, and NY 896418, dated April 6, 1994, are *revoked*.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF JACQUARD WOVEN FABRIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of jacquard woven fabric. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before March 15, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue. N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of jacquard woven fabric.

In New York ruling letter (NY) 810195, dated June 8, 1995, jacquard woven fabric composed of 100 percent artificial filament yarns was classified in subheading 5408.33.9090, HTSUSA, which provides for woven fabrics of artificial filament yarn which contain less than 85 percent by weight of artificial filaments. This ruling letter is set forth in "Attachment A". This office has reviewed the decision in NY 810195 and it is our opinion that it is in error.

At issue in this proposed modification is whether the subject merchandise, i.e., the jacquard woven fabric, is more specifically provided for in subheading 5408.23.2960, HTSUSA, in the provision for woven fabrics of artificial filament yarn which contain more than 85 percent by weight of artificial filaments.

Customs intends to modify NY 810195, to reflect proper classification of the jacquard woven fabric in subheading 5408.23.2960, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 958501 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 29, 1996.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 8, 1995.
CLA–2–54:S:N:N6:352 810195
Category: Classification
Tariff No. 5408.33.9090

MR. SOSSI MAGHAKIAN
JAMES J. BOYLE & CO.
2525 Corporate Place #100
Monterey Park, CA 91754

Re: The tariff classification of rayon woven fabric from China.

DEAR MR. MAGHAKIAN:

In your letter dated May 11, 1995, on behalf of your client Neman Brothers & Associates, Inc., you requested a classification ruling.

The submitted sample of woven fabric is composed of 100 percent filament rayon. Laboratory analysis reveals that this fabric contains 129.9 single yarns per centimeter in the

warp and 87 single yarns per centimeter in the filling. This textile product is constructed using 60 denier yarns in the warp and 120 denier yarns in the filling. It is jacquard woven with yarns of different colors. Weighing 226 grams per square meter, it will be imported in 70 centimeter widths.

The applicable subheading for this woven fabric will be 5408.33.9090, Harmonized Tariff Schedule of the United States (HTS), which provides for woven fabrics of artificial filament yarn, including woven fabrics obtained from materials of heading 5404, other woven fabrics, of yarns of different colors, other, other, other, other. The duty rate will be 16.5 percent *ad valorem*.

This fabric falls within textile category designation 629. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal Issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:TE 958501 jb
Category: Classification
Tariff No. 5408.23.2960

SOSSI MAGHAKIAN
JAMES J. BOYLE & CO.
2525 Corporate Place, #100
Monterey Park, CA 91754

Re: Modification of NY 810195; classification of jacquard woven fabric: fabric made of 100 percent artificial filament yarn; subheading 5408.23.2960, HTSUSA.

DEAR MR. MAGHAKIAN:

On June 8, 1995, our New York office issued to you, on behalf of your client, Neman Brothers & Assoc. Inc., New York ruling letter (NY) 810195, classifying a jacquard woven fabric. This is to inform you that the classification determination in NY 810195 is incorrect.

Facts:

The subject merchandise consists of jacquard woven fabric. A sample of the fabric was submitted to the New York Customs Laboratory for analysis which determined that the fabric is composed of 100 percent artificial filament rayon yarns. It contains 129.9 single yarns per centimeter in the warp and 87 single yarns per centimeter in the filling. This jacquard woven fabric, composed of yarns of different colors, weighs 216.9 g/m^2. You state that the fabric is to be imported in 70 centimeter widths.

NY 810195 classified the jacquard woven fabric in subheading 5408.33.9090, HTSUSA, which provides for woven fabrics of artificial filament yarn which contain less than 85 percent by weight of artificial filaments.

Issue:

What is the proper classification of the merchandise at issue?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Heading 5408, HTSUSA, provides for woven fabrics of artificial filament yarn, including woven fabrics obtained from materials of heading 5405. Subheading 5408.33.9090, HTSUSA, provides for fabrics of artificial filament yarn which contain less than 85 percent by weight of artificial filaments. As the subject jacquard woven fabric is composed of 100 percent artificial filament yarn, it was incorrectly classified in subheading 5408.33.9090, HTSUSA.

Subheading 5408.23.2960, HTSUSA, provides for fabrics of artificial filament yarn which contain more than 85 percent by weight of artificial filaments. Accordingly, the subject jacquard woven fabric is so classified.

Holding:

The subject 100 percent filament rayon jacquard woven fabric is correctly classified in subheading 5408.23.2960, HTSUSA, which provides for woven fabrics of artificial filament yarn, including woven fabrics obtained from materials of heading 5405: other woven fabrics, containing 85 percent or more by weight of artificial filament or strip or the like: of yarns of different colors: the thread count of which per cm (treating multiple (folded) or cabled yarns as single threads) is over 69 but not over 142 in the warp and over 31 but not over 71 in the filling: other: other; weighing more than 170 g/m^2. The applicable rate of duty is 16.5 percent *ad valorem* and the quota category is 618.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that your client check, close to the time of shipment, the *Status on Current Import Quotas (Restraint Levels)* and issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF PORTABLE DATA COLLECTION TERMINALS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings pertaining to the tariff classification of portable data collection terminals. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before March 15, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Branch, Tariff Classification Appeals Division, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings pertaining to the tariff classification of portable data collection terminals.

In New York Ruling Letter (NY) 896417, issued by the Area Director of Customs, New York Seaport, on April 6, 1994, the PDT 3100 portable data collection terminal with optional scanner was held to be classifiable under subheading 8471.20.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for digital automatic data processing (ADP) machines, containing in the same housing at least a central processing unit and an input and output unit, whether or not combined. Parts for the terminal were classified under subheading 8473.30.50, HTSUS, which provides for other parts and accessories of the machines of heading 8471, HTSUS. In NY 802011, issued by the

Area Director of Customs, New York Seaport, on September 19, 1994, the PDT 3300 and PDT 3300IS portable data collection terminals were also held to be classifiable under subheading 8471.20.00, HTSUS, while parts of these terminals were classified under subheading 8473.30.50, HTSUS. NY 898417 is set forth in Attachment A to this document. NY 802011 is set forth in Attachment B to this document.

Customs Headquarters is of the opinion that the PDT 3100 with scanner, PDT 3300 and PDT 3300IS portable data collection terminals, do not meet the definition of "ADP machine" found in note 5(A) to chapter 84, HTSUS, as it is not "freely programmable," and therefore cannot be classified under subheading 8471.20.00 HTSUS.

The PDT 3100 with scanner is a General Rule of Interpretation (GRI) 3(b) composite good, and its "essential character" is provided by its terminal component. This component, and therefore the PDT 3100 with scanner, is classifiable under subheading 8471.92.10, HTSUS, which provides for combined input/output units for ADP machines. The PDT 3300 and PDT 3300II are also classifiable under this subheading. Parts of the PDT 3100, PDT 3300 and PDT 3300II were properly classified in NY 896417 and NY 802011.

Customs intends to revoke NY 896417 and NY 802011 to reflect the proper classification of the portable data collection devices under subheading 8471.92.10, HTSUS. Proposed Headquarters Ruling Letter 956839, which concerns the classification of similar devices, modifying NY 896417 and NY 802011, is set forth in Attachment C to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 29, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York. NY, April 6, 1994.

CLA–2–84:S:N:N1:110 896417
Category: Classification
Tariff No. 8471.20.0090 and 8473.30.5000

MS. ANN MARIE DOWLING
SEINO AMERICA. INC.
147–60 175th Street
Jamaica, NY 11434

Re: The tariff classification of a PDT 3100 data terminal, keypads, and plastic housings from Taiwan and Singapore.

DEAR MS. DOWLING:

In your letter dated March 29, 1994, you requested a tariff classification ruling.

The merchandise under consideration involves a PDT 3100 data terminal, the plastic/rubber keypad for this unit, and the plastic housing and frame for this unit. The PDT 3100 is a hand-held data collection computer that incorporates a 16-bit DOS industry standard operating system for application development. The PDT 3100 can be used by itself or with an integrated scan head option to maximize data collection productivity through laser scanning. This device has the ability to execute, without human intervention, a processing program which may modify the execution of this program by logical decision during the processing run. This device can be used as a data collection computer, but also for asset tracking, electronic ordering, and in-store retail applications. Noting Legal Note 5(A)(a) to chapter 84, this device would appear to meet the definition of a digital processing machine.

The silicone keypad for the PDT 3100 unit is specially designed for the hand-held computer and consists essentially of 35 plastic keys attached to a rubber frame. The back of the keypad incorporates small "carbon pills". Noting the Explanatory Notes for heading 8536, this keypad component for the PDT 3100 does not appear to fall under the definition of electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits.

The plastic molded parts for the PDT 3100 unit, such as the housing (top and bottom halves), cover, and frame, are, specifically designed for the hand-held computer.

The applicable subheading for the PDT 3100 computer will be 8471.20.0090, Harmonized Tariff Schedule of the United States (HTS), which provides for digital automatic processing machines, containing in the same housing at least a central processing unit and an input and output unit, whether or not combined. The rate of duty will be 3.9 percent *ad valorem*.

The applicable subheading for the keypad and plastic molded parts such as the housing, will be.8473.30.5000, HTS, which provides for other parts and accessories of the machines of heading 8471, not incorporating a cathode ray tube. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the customs Regulations (19 C.F.R 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 19, 1994.

CLA–2–84:S:N:N1:110 802011
Category: Classification
Tariff No. 8471.20.0090 and 6473.30.5000

MS. ANN MARIE DOWLING
SEINO AMERICA INCORPORATED
147–60 175th Street
Jamaica, NY 11434

Re: The tariff classification of portable computers, and keypads from Taiwan.

DEAR MR. DOWLING:

In your letter dated September 8, 1994, on behalf of Symbol Technologies, Inc., you requested a tariff classification ruling.

The merchandise under consideration involves Portable Data Computers (model numbers PDT 3300 & PDT 3300IS), and silicon keypads for the PDT 3300 and PDT 3300IS. These Portable Data Computers are primarily used for the collection of data.

The PDT 3300 Portable Data Computer is a hand-held computer that has a DOS operating system, BIOS, and diagnostics. It incorporates a LED display screen and keypad. This hand-held computer is primarily designed for the collection of data, and the distribution of the data based upon specified algorithmic decisions or external stimuli output. The data may be collected, modified and distributed based upon the program in the unit. A printer and a modem may be connected to this hand-held computer. The PDT 3300IS model is deigned to be used in potentially combustible environments such as oil and gas refineries.

The PDT 3300 Portable Data Computer series appears to meet the definition of Legal Note 5(A) of Chapter 84 HTS, since it functions as a digital processing machine, and has the ability to execute without human intervention, a processing program which may modify the execution of the program by logical decision during the processing run.

The silicon keypads for the PDT 3300 and the PDT 3300IS is the top "membrane" for the keypad. It functions as a "trigger" to the terminal. The "bumps" on the keypad depress the actual contacts to provide the electrical connection. The keypad itself is not connected to any electronic components. The keypad for the PDT 3300 is dedicated to the PDT 3300 Portable Data Computer series.

The applicable subheading for the PDT 3300 and PDT 3300IS Portable Data Computers will be 8471.20.0090, Harmonized Tariff Schedule of the United States (HTS), which provides for digital automatic data processing machines, containing in the same housing at least a central processing unit and an input and output unit, whether or not combined. The rate of duty will be 3.9 percent *ad valorem*.

The applicable subheading for the silicon keypads for the PDT 3300 and the PDT 3300IS, Portable Data Computers will be 8473.30.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for other parts and accessories of the machines of heading 6471. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 956839 LTO
Category: Classification
Tariff No. 8473.30.50

PORT DIRECTOR
U.S. CUSTOMS SERVICE
610 W. Ash Street, STE 1200
San Diego, CA 92101–3213

Re: IA 43/94; Portable data collection terminals; PDT 3100 portable data computer with laser scanner option; base assembly with speaker; HQs 088941, 952862; NYs 802011, 896417 *modified;* heading 9013; GRI 3(b); "freely programmable;" section XVI, note 2(a); chapter 84, note 5(A)(B); chapter 90, note 2(a); chapter 90, additional U.S. note 3.

DEAR PORT DIRECTOR:

This is in response to your memorandum dated June 29, 1994 [Clas–1:CO MM], requesting the classification of a "base assembly with speaker" for the PDT 3100 Portable Data Computer with Laser Scanner Option, manufactured by Symbol Technologies, Inc., under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The subject articles are "base assemblies with speakers" for the PDT 3100 Portable Data Collection Terminal (PDT 3100), which is a small, hand held terminal that is ideal for a wide range of data tracking applications, such as, package and asset tracking, electronic ordering systems and in-store retail. The PDT 3100 has a 35-key keyboard, 256K of NVM for program storage, a 4 × 20 supertwist display and 640K RAM for data collection. The PDT 3100 is normally sold with an optional laser scan device that fits on the end of the unit. Without the optional laser scan device, the PDT 3100 does not incorporate any optical components.

Issue:

Whether the "base assemblies with speakers" for the PDT 3100 terminal are classifiable as parts of ADP units under heading 8473, HTSUS, or as parts of optical appliances or instruments under heading 9013, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

Because the "base assembly with speakers" is a specially designed part of the PDT 3100 terminal and is not a "good included" in any chapter 84, 85 or 90 heading, it is necessary to determine the classification of the terminal. *See* section XVI, note 2(a); chapter 90, note 2(a), HTSUS. The headings under consideration are as follows:

8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included
9013	Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof

The PDT 3100 itself does not incorporate any "optical" components. Thus, the terminal, when imported without the laser scanner, cannot be classified as an optical instrument under heading 9013, HTSUS.

Heading 8471, HTSUS, covers both ADP machines and units thereof. Note 5(A) to chapter 84, HTSUS, defines the term *automatic data processing machines* for purposes of this heading. The definition is expressed in terms of the abilities an ADP machine must possess. Note 5(A)(a)(2) to chapter 84 states that digital ADP machines must be capable of "being

freely programmed in accordance with the requirements of the user." The PDT 3100 terminal does not meet this definition.

The PDT 3100 terminal, which has a very small screen and keypad, is not a "general purpose" machine like a standard laptop or desktop terminal, nor does it provide the general purpose display capability of these machines. *See* HQ 952862, dated November 1, 1994 (regarding the "freely programmable" requirement). The PDT 3100 terminal is designed for specific applications (i.e., package and asset tracking, electronic ordering systems and in-store retail), and, unlike a standard laptop or desktop terminal, cannot be programmed by the user to perform word processing, make a spreadsheet, play games, etc. Although it has some processing capability, the PDT 3100 terminal is not "freely programmable," and therefore, is not an ADP machine. Accordingly, the PDT 3100 terminal cannot be classified under subheading 8471.20.00, HTSUS.

With regard to the classification of separately housed units of ADP machines, note 5(B) to chapter 84, HTSUS, provides as follows:

> Automatic data processing machines may be in the form of systems consisting of a variable number of separately housed units. A unit is to be regarded as being a part of the complete system if it meets all of the following conditions:
>
> (a) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (b) It is specifically designed as a part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system).

Such units entered separately are also to be classified in heading 8471.

The PDT 3100 terminal is an ADP unit, as it connects to the host computer's central processing unit and accepts and delivers data which can be used by the ADP system. Specifically, the PDT 3100 terminal is classifiable under subheading 8471.92.10, HTSUS, which provides for combined input/output units.

However, when imported with the scanner, the PDT 3100 terminal consists of an ADP unit—the terminal—and a device which is not classifiable as an ADP unit—the scanner. The scanner portion of the PDT 3100 is *prima facie* classifiable as an optical instrument, not specified or included elsewhere in chapter 90, under heading 9013, HTSUS. The scanner incorporates an optical element (mirror) that play a vital role in the device's scanning process. *See* Additional U.S. note 3 to chapter 90, HTSUS (defining "optical instruments" for chapter 90 purposes); HQ 088941, dated January 16, 1992 (defining "subsidiary").

As there is no single heading that covers the PDT 3100 with scanner, it is necessary to resort to GRI 3, HTSUS, which governs the classification of goods that are, *prima facie*, classifiable under two or more headings. GRI 3(a) requires that the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the components contained in a composite good, those headings are to be regarded as equally specific in relation to those goods. Headings 8471 and 9013, HTSUS, each refer to part only of the PDT 3100 with scanner. Accordingly, no single heading provides a specific description of the entire device.

GRI 3(b), HTSUS, provides that "composite goods consisting of different materials or made up of different components, * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable." The PDT terminal is a combined input/output unit that is "ideal for a wide range of data intensive applications." The scanner option "offers a cost-effective way to maximize * * * productivity through laser scanning." While the scanner option enhances the capabilities of the PDT 3100, the PDT 3100 terminal functions as a sophisticated input/output device without it. Moreover, the terminal portion of the PDT 3100, when imported with the scanner, represents two-thirds of the total cost of the entire unit. Accordingly, the PDT 3100 terminal gives the unit its "essential character," and the PDT 3100 with scanner is therefore classifiable under subheading 8471.92.10, HTSUS. Because the PDT 3100 with scanner is classifiable as an ADP unit, it is unnecessary to discuss whether the device is classifiable as an "optical reader [ ] * * * **not elsewhere specified or included** (emphasis added)" (subheading 8471.99.90, HTSUS). The "base assembly with speakers" for the PDT 3100 is classifiable as a part under subheading 8473.30.50, HTSUS, which provides for other parts and accessories for the machines of heading 8471, HTSUS.

In NY 896417, issued by the Area Director of Customs, New York Seaport, on April 6, 1994, the PDT 3100 with scanner, and in NY 802011, issued on September 19, 1994, the PDT 3300 and PDT 3300IS, were held to be classifiable under subheading 8471.20.00, HTSUS, which provides for "[d]igital automatic processing machines, containing in the same housing at least a central processing unit and an input and output unit, whether or not combined" (i.e., laptop computers). Like the PDT 3100 and PDT 3100 with scanner, the PDT 3300 and PDT 3300IS do not meet the definition of "ADP machine" found in note 5(A) to chapter 84, HTSUS. Rather, the PDT 3100, PDT 3100 with scanner (according to GRI 3(b)), PDT 3300 and PDT 3300IS terminals, are classifiable as combined input/output units under subheading 8471.92.10, HTSUS. NY 802011 and 896417 are modified accordingly.

Holding:

The "base assembly with speakers" for the PDT 3100 Portable Data Computer with Laser Scanner Option is classifiable under subheading 8473.30.50, HTSUS, which provides for other parts and accessories for the machines of heading 8471, HTSUS. The corresponding rate of duty for articles of this subheading is *free*.

Effect on Other Rulings:

NY 802011, dated September 19, 1994, and NY 896417, dated April 6, 1994, are *modified*.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

Slip Op. 96–15

SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00498

(Dated January 16, 1996)

JUDGMENT

TSOUCALAS, *Judge:* In *SKF USA Inc. v. United States,* 19 CIT ___, Slip Op. 95–82 (May 4, 1995) *("SKF Italy"),* this Court remanded the final results of the Italian review for removal of best information available ("BIA") from the Department of Commerce, International Trade Administration's ("Commerce") calculation of constructed value ("CV") for material costs of inputs obtained from related suppliers. The remand affects one of the reviewed companies from Italy, SKF Industrie S.p.A. ("SKF Industrie"), with respect to ball bearings ("BBs") and cylindrical roller bearings ("CRBs"). There is no antidumping duty order on spherical plain bearings ("SPBs") from Italy. The remand concerns the third administrative review of the antidumping duty order covering antifriction bearings (other than tapered roller bearings) and parts thereof from Italy. *See Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results"),* 58 Fed. Reg. 39,729 (July 26, 1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 42,288 (August 9, 1993); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 51,055 (September 30, 1993); and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof*

From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews, 59 Fed. Reg. 9,469 (February 28, 1994).

SKF USA Inc. and SKF Industrie S.p.A. (collectively "SKF") alleged error in Commerce's CV calculation methodology in the Final Results and prevailed before this Court. In *SKF Italy,* 19 CIT at ____, Slip Op. 95–82 at 18, the Court remanded this case to Commerce to eliminate its use of best information available in calculating CV for related party inputs. In accordance with the Court's instructions in *SKF Italy,* Commerce removed BIA from its CV calculation of material costs for inputs obtained from related suppliers. The recalculated weighted average dumping margins for SKF Industrie are 4.47% for BBs and 0.00% for CRBs.[1] *Final Results of Redetermination Pursuant to Court Remand, SKF USA Inc. and SKF Industrie S.p.A. v. United States, Slip Op. 95–82 (May 4, 1995) ("Redetermination on Remand")* at 4. Commerce's Redetermination on Remand used SAS ("Statistical Analysis Software") Version 6.08 rather than SAS Version 6.07 which was used during the original administrative determination. Commerce made no margin modifications to compensate for discrepancies between the original and the recalculated margins resulting from use of the updated computer software. On July 27, 1995, Commerce issued its draft of the final results of redetermination pursuant to court remand. *Remand Public Record,* Document No. 3.

On August 2, 1995, SKF filed comments on Commerce's draft results. SKF noted that, despite the fact that Commerce followed this Court's remand instructions, SKF Industrie's margins on BBs increased as a result of Commerce's having used computer SAS Version 6.08 rather than SAS Version 6.07. SKF argued that Commerce could not justify letting the margin increase stand unless it had knowledge of how technical problems in the 6.07 software version affected the margins calculated in the original Final Results. *Remand Public Record,* Document No. 4 at 1–3. SKF further argued that there are no guarantees that the 6.08 computer software version is more accurate than the 6.07 version. Finally, according to SKF: (1) use of the updated software threatens the finality of Commerce's determinations as the errors in the original software were not clerical errors appealed from by SKF; (2) the new software is not part of the administrative record of this case; and (3) use of the new software cannot be used to penalize parties for bringing an appeal. *Id.* at 4–5.

In responding to SKF's comments, Commerce stated:

> We disagree with SKF. The software problems at issue here are ministerial errors. These errors could not have been discovered until the remand calculation was performed. The Department's use of the most recent version of SAS computer software is consistent with our practice of correcting ministerial errors discovered during remand. SKF's proposed changes do not correct the errors present

[1] SKF Industrie's margins in the Final Results were 4.46% for BBs and 0.00% for CRBs. *Final Results,* 58 Fed. Reg. at 39,731.

in SAS Version 6.07; rather, these adjustments assume that Version 6.07 represents the "correct" SAS code. In light of information we received from the SAS Institute indicating that Version 6.08 corrects errors found in Version 6.07 (not vice versa), we conclude that Version 6.08 is the computer program that calculates margins most accurately. Further, we note that SKF has not identified any errors in the code of 6.08.

The CIT has stated "Commerce is not precluded from correcting previously undiscovered errors in its determinations when it discovers them in the process of discovering other errors. The Court is 'loathe to affirm a determination that might be based on a questionable record'." *See Koyo Seiko v. U.S.*, 819 F. Supp. 1093 (CIT 1993). Accordingly, we decline to make SKF's proposed adjustments.

Redetermination on Remand at 3–4.

The Torrington Company ("Torrington") also responded to SKF's comments, arguing that SKF had failed to identify any specific error in the SAS Version 6.08 package. *Remand Public Record,* Document No. 5 at 1–2.

SKF now avers that the original Final Results established the upper limits of its dumping margins and that Commerce's recalculations are not in the spirit and not within the scope of this Court's remand order. *SKF'S Comments Regarding Final Results of Redetermination ("SKF's Comments")* at 3–6. In addition, SKF claims that Commerce's use of the new SAS 6.08 version is not the mere correction of a ministerial error. *SKF's Comments* at 6–7. Finally, SKF contends that the dumping margin increases resulting from Commerce's change in computer software are a gross injustice which must be remedied. *Id.* at 8–10. SKF argues that nothing in *SKF Italy,* 19 CIT at ___, Slip Op. 95–82, or the accompanying remand order, gave Commerce the authority "in choosing a starting point for its recalculation, to depart from the dumping margin in the Final Results that used SAS Software Version 6.07, or to use SAS Software Version 6.08 to recalculate that margin." *Id.* at 4. SKF contends that Commerce's Redetermination on Remand deviates significantly from the Court's remand order and should be rejected. *Id.* SKF suggests that, in light of the anomalous results reached because of the change in computer software, Commerce make a "downward adjustment of the margin that increased as a result of the software change." *Id.* at 9. According to SKF, "[t]he *original* final margin should be decreased by the percentage by which the new (6.08) margin was reduced as a result of this Court's order." *Id.*

Torrington maintains that use of the most recent and accurate SAS version is consistent with Commerce's practice of correcting ministerial errors during remand. *The Torrington Company's Comments on the Final Results of Redetermination Pursuant to Court Remand ("Torrington's Comments").* Torrington believes that Commerce's Redetermination on Remand fully implements this Court's order. *Torrington's Comments.*

In *SKF Italy,* 19 CIT at ___, Slip Op. 95–82, this Court remanded the final results of the Italian review to Commerce for removal of BIA from its calculation of constructed value for related party inputs. The Court did not indicate how the removal of BIA from Commerce's CV calculation was expected to affect SKF Industrie's dumping margins. In accordance with the remand order, Commerce removed BIA from its calculation of CV for material costs of inputs obtained from related suppliers. *See Redetermination on Remand* at 4.

In preparing to comply with this Court's remand order, Commerce ran its computer programs and noted certain discrepancies between the current results and those obtained for the third review final. Upon investigating further, Commerce learned from SAS Institute Inc. that SAS Version 6.07 may have incorrectly evaluated certain Boolean expressions *(i.e.,* true/false data steps) without providing any warning that errors were occurring. According to SAS Institute, this problem, as well as others, was corrected by SAS Version 6.08 and SAS Version 6.07 has been withdrawn. *See id.* at 2; *Remand Public Record,* Document No. 2. In light of information Commerce received from SAS Institute indicating that the 6.08 software version corrects errors found in the 6.07 version (not vice versa), Commerce concluded that SAS Version 6.08 was the computer program that calculates margins most accurately. Commerce, therefore, utilized the updated software for its recalculations.

The statute defines ministerial errors as including "errors in addition, subtraction, or other arithmetic function * * * and any other type of unintentional error which the administering authority considers ministerial." 19 U.S.C. § 1673d(e) (Supp. V 1994). *See also* 19 C.F.R. § 353.28(d) (1993). The Court is satisfied with Commerce's explanation of its reasons for using SAS Version 6.08 in correcting ministerial errors discovered during remand. Moreover, SKF has not identified any specific errors in the SAS Version 6.08 code. Accordingly, the Court sustains Commerce's Redetermination on Remand in its entirety.

(Slip Op. 96–16)

SKF USA INC. AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00499

(Dated January 16, 1996)

JUDGMENT

TSOUCALAS, *Judge:* In *SKF USA Inc. v. United States,* 19 CIT ___, Slip Op. 95–85 (May 8, 1995) *("SKF Sweden"),* this Court remanded the

final results of the Swedish review for removal of best information available ("BIA") from the Department of Commerce, International Trade Administration's ("Commerce") calculation of constructed value ("CV") for material costs of inputs obtained from related suppliers. The remand affects one of the reviewed companies from Sweden, SKF Sverige AB ("SKF Sverige"), with respect to ball bearings ("BBs") and cylindrical roller bearings ("CRBs"). There is no antidumping duty order on spherical plain bearings ("SPBs") from Sweden. The remand concerns the third administrative review of the antidumping duty order covering antifriction bearings (other than tapered roller bearings) and parts thereof from Sweden. *See Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results")*, 58 Fed. Reg. 39,729 (July 26, 1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 58 Fed. Reg. 42,288 (August 9, 1993); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 58 Fed. Reg. 51,055 (September 30, 1993); and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 59 Fed. Reg. 9,469 (February 28, 1994).

Plaintiff SKF Sverige AB is a manufacturer and exporter in Sweden and plaintiff SKF USA Inc. is a U.S. importer of antifriction bearings (other than tapered roller bearings) and parts thereof. SKF Sverige and SKF USA Inc. (collectively "SKF") alleged error in Commerce's CV calculation methodology used in the Final Results and prevailed before this Court. In *SKF Sweden*, 19 CIT at ____, Slip Op. 95–85, the Court remanded this case to Commerce for removal of BIA from its calculation of CV for related party inputs. In accordance with the remand order, Commerce removed BIA from its CV calculation of material costs for inputs obtained from related suppliers. The recalculated weighted average dumping margins for SKF Sverige were 7.77% for BBs and 5.35% for SPBs.[1] *Final Results of Redetermination Pursuant to Court Remand, SKF USA Inc. and SKF Sverige AB v. United States, Slip Op. 95–85 (May 8, 1995) ("Redetermination on Remand")* at 2. Commerce's Redetermination on Remand used computer SAS ("Statistical Analysis Software") Version 6.08 rather than SAS Version 6.07 which was used during the original administrative determination. Commerce made no margin modifications to compensate for discrepancies between the original and the recalculated margins resulting from use of the updated computer software.

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[1] Margins for SKF Sverige in the Final Results were 7.79% for BBs and 5.35% for SPBs. *Final Results*, 58 Fed. Reg. at 39,731.

On July 27, 1995, Commerce issued its draft of the final results of redetermination pursuant to court remand. *See Remand Public Record*, Document No. 3. No comments were received by Commerce from SKF or the petitioner in the original investigation, The Torrington Company ("Torrington"), concerning SKF Sweden.

In addition, SKF states, "Commerce's use of new software appears to have had no perceptible impact on SKF's antidumping duty margins. Consequently, although SKF objects generally to the use of this new software for Commerce's remand results, SKF does not object to the specific Remand Results issued by Commerce in this case." *SKF's Comments Regarding Final Results of Redetermination* at 2. SKF also notes that "Commerce's Remand Results herein should be affirmed." *SKF's Rebuttal Comments on Final Remand Results* at 2. Torrington asserts that Commerce's Redetermination on Remand fully implements this Court's order of remand. *The Torrington Company's Comments on the Final Results of Redetermination Pursuant to Court Remand.*

As SKF and petitioner raise no objection to Commerce's remand results and SKF supports affirmance, the Court sustains Commerce's Redetermination on Remand in its entirety.

(Slip Op. 96–17)

PIMA WESTERN, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–04–00285

[Plaintiff's Motion for Summary Judgment Denied; Defendant's Motion for Summary Judgment Granted.]

(Decided January 16, 1996)

Stein Shostak Shostak & O'Hara, Steven B. Zisser, Bruce N. Shulman, and *Scott Rosenow,* counsel for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-In-Charge, and *Susan Mansfield,* International Trade Field Office, Civil Division, Dept. Of Justice, Commercial Litigation Branch, for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* Plaintiff, Pima Western, challenges the classification of oleoresin of paprika formulated for use as a food coloring and imported into the United States from Mexico. The Customs Service classified the product under the Harmonized Tariff Schedule of the United States ("HTSUS") as "Coloring matter of vegetable or animal origin (including dyeing extracts but excluding animal black), whether or not

chemically defined; preparations as specified in note 3 to this chapter based on coloring matter of vegetable or animal origin [heading 3203.00]: * * * Other " This subheading, 3203.00.50, carries a tariff of 3.1% *ad valorem*.

Pima Western asserts that the classification is incorrect. It claims that the product should be classified as "Essential oils (terpeneless or not), including concretes and absolutes; resinoids; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by-products of the deterpenation of essential oils; aqueous distillates and aqueous solutions of essential oils [heading 3301]: * * * Resinoids: * * * Prepared oleoresins consisting essentially of nonvolatile components of the natural raw plant [subheading 3301.30]"[1]. Pima Western points out that this subheading has a statistical suffix for "Paprika" [3301.30.10.10]. Such goods, if imported from Mexico, are free of duty.

The parties have submitted competing motions for summary judgment based on stipulated facts. For the reasons that follow, the Court denies Pima Western's motion, grants the government's motion and enters a final judgment in favor of the United States.

A

JURISDICTION LIES PURSUANT TO 28 U.S.C. § 1581(a)

The Customs Service liquidated the products at issue on January 25, 1991. Pima Western filed a timely protest on February 19, 1991. 19 U.S.C. § 1514(c)(3) (1994). The Customs Service denied the protest on October 30, 1991. Pima Western filed its summons timely on April 24, 1992. 28 U.S.C. § 2636(a) (1988). These jurisdictional prerequisites having been satisfied, this Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

B

SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT

The Court may grant a motion for summary judgment "if the pleadings * * * and admissions on file * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCITR 56(d). Here, the parties have stipulated to the material facts.

The meaning of tariff terms is a question of law, while their application to a particular product is a question of fact. *E.M. Chem. v. United States*, 9 Fed. Cir. (T) 33, 35, 920 F.2d 910, 912 (1990).

Pursuant to 28 U.S.C. § 2639(a)(1), the Customs Service classification in this case is entitled to a presumption of correctness, and the burden of proof that it is not correct lies with Pima Western. *E.g., Lynteq, Inc. v. United States*, 10 Fed. Cir. (T) ____, 976 F.2d 693, 696 (Fed. Cir. 1992).

[1] The Court notes that Congress amended HTSUS 3301.30 in 1995, placing "extracted oleoresins" under subheading 3301.90.10. Given the earlier dates of entry and liquidation, this later amendment is not relevant.

The Court "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878, *reh'g denied,* 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984).

II

MATERIAL FACTS

The parties' Stipulation of Facts In Lieu of Trial states that Pima Western's imported prepared oleoresin of paprika consists essentially of nonvolatile components chemically extracted from dried, ground pods of red ripe chili peppers (capsicum annum). Stipulation ¶¶5, 6. Oleoresins of paprika can be formulated for coloring or flavoring purposes. Stipulation ¶¶7–10, Plaintiff's Memorandum In Support of Motion for Summary Judgment at 6. The oleoresin at issue is used primarily for coloring food, *e.g.,* to make otherwise unappetizing raw beef look red and fresh. Stipulation ¶10. Indeed, the sample bottle that Pima Western placed in evidence at oral argument of these motions is labeled "PAPRIKA OLEORESIN, **40,000 Color Units".** Plaintiff's Exhibit 1 (emphasis added). The oleoresin was grown and processed in Mexico. Stipulation ¶11.

III

DISCUSSION

A

OLEORESIN OF PAPRIKA FORMULATED AS COLORING MATTER IS PROPERLY CLASSIFIED UNDER HTSUS 3203.00.50

Rule 1 of the General Rules of Interpretation [GRI] of the HTSUS is the starting point for analysis of classification under the HTSUS. It provides:

> The titles of sections, chapters and subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions [indicating GRI 2, 3, *et seq.].*

When the plain language of the heading selected by Customs and that suggested by Pima Western is compared to the parties' agreed description of the product as an oleoresin coloring substance derived from a plant, both headings appear to describe Pima Western's product. It is both a "preparation * * * based on coloring matter of vegetable * * * origin", HTSUS 3203, and a "resinoid", HTSUS 3301. Were that the extent of the Court's initial review, it would conclude that they are both applicable *prima facie* and resort to the General Rules of Interpretation that come after GRI 1.

GRI 1, however, requires the Court to review section and chapter notes to determine fully the headings' meanings. Note 3 to Chapter 32 provides in relevant part as follows:

> Heading * * * 3203 appl(ies) also to preparations based on coloring matter * * * of a kind used for coloring any material or used as ingredients in the manufacture of coloring preparations * * *.

In determining the entire scope of Heading 3203 indicated by this Chapter Note, the Court may examine relevant Explanatory Notes.

The Explanatory Notes generally are indicative of the proper interpretation of the HTSUS, although they are not legally binding on the United States. *E.g., Lynteq,* 976 F.2d at 699. They were prepared by the Customs Cooperation Council ("CCC") to set forth its official interpretation of the Harmonized Tariff System, which the HTSUS embodies. Report of the Joint Committee on the Omnibus Trade and Competitiveness Act of 1988, H. Conf. R. No. 576, 100th Cong., 2d Sess. at 549; *Ugg Int'l, Inc. v. United States,* 17 CIT 79, 83–84, 813 F. Supp. 848, 853 (1993). "They provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system." Report of the Joint Committee on the Omnibus Trade and Competitiveness Act of 1988, H. Conf. R. No. 576 at 549.[2]

Where the United States has adopted headings, subheadings, and related chapter notes verbatim from the CCC's version, the CCC's Explanatory Notes are especially helpful in interpreting the HTSUS, albeit not dispositive. *See Ugg Int'l, Inc.,* 813 F. Supp. at 853 ("In this case, the fact [that] Congress adopted the essential terms of Chapter 43, Explanatory Note 1 in Chapter 43, Note 1 suggests [that] Congress intended to adopt the [CCC]'s interpretation * * *."). That is the case with the headings, subheadings and chapter notes of Chapters 32 and 33 relevant here. *See* Explanatory Notes to Harmonized Nomenclature Ch. 32, 33. Therefore, the Court refers to the Explanatory Notes to Chapters 32 and 33 to aid its understanding of the analogous Chapter Notes and headings in the United States schedule.

Explanatory Note 33.01(A) sets forth the products that are intended to come under the rubric "Resinoids":

> Resinoids are products used mainly as fixatives in the perfume, cosmetic, soap or surfactant industries * * *. Certain products obtained by organic solvent extraction or extraction by gas under pressure and marketed as "prepared oleoresins" or spice oleoresins, consisting essentially of the non-volatile components (resins) of the natural raw plant materials (e.g., spices and herbs), also fall

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[2] Counsel for Pima Western suggested at oral argument that the Explanatory Notes do not apply to classifications at the eight-digit subheading level. He reasoned that since the CCC's Harmonized System goes to only six digits, the CCC's interpretive aids are similarly limited, and therefore inapplicable here. The Court disagrees. The eit-dghigit level of classification is subsidiary to, not an expansion of, the six- and four-digit levels. If the Explanatory Notes offer guidance that a product should be excluded from a four-digit heading or six-digit subheading, one can properly infer that the product is excluded from the eight-digit subheading. Of course, if the eight-digit subheading, a United States enactment, is at odds with an Explanatory Note, a non-binding CCC promulgation, then the Court would be required to apply the eight-digit subheading without regard to the Explanatory Note. That is not the case here.

> in this heading. These products are used principally as flavouring agents in the food industry.

The Explanatory Note thus contemplates that oleoresins of paprika formulated for use as flavoring agents are classifiable under heading 33.01. It treats oleoresins used as coloring agents, however, quite differently:

> The heading [33.01] also **excludes:**
>
> (a) Natural oleoresins (**heading 13.01).**
> (b) **Prepared oleoresins used as colouring matter (heading 32.03).**

Explanatory Note 33.01(A)(a)(b)(emphasis in original and added).

Pima Western's product is a prepared oleoresin used as a food coloring. Stipulation ¶¶4–10, Plaintiff's Exhibit 1. Therefore, the Court concludes that the HTSUS headings and Chapter Notes call for classification of this oleoresin of paprika under heading 3203, and that classification under HTSUS heading 3301 would be incorrect.

B

BECAUSE CLASSIFICATION IS COMPLETE UNDER GRI 1, THE COURT DOES NOT UNDERTAKE A SPECIFICITY ANALYSIS

Pima Western's primary argument is that HTSUS 3301.30.10 is more specific than HTSUS 3203.00.50.[3] Pursuant to GRI 3(a), the more specific heading is preferred. Pima Western's argument is flawed, but it need not be reached in any event. When, as here, the Headings and Chapter Notes themselves are dispositive, GRI 1 governs, the Court does not reach GRI 3(a), and it does not undertake a specificity analysis.

By its terms, GRI 1 refers the Court to the analytical methods described in subsequent rules *only* "provided such headings or notes do not otherwise require * * *." In other words, *only* when the Headings and the Chapter and Section Notes do not themselves determine classification does one look to the subordinate GRI's in the HTSUS hierarchy. GRI 1; "Classification of Goods Under General Rule of Interpretation 1 of the Harmonized System", Customs Service General Notices, O.C.O.D. 89–1; *see also Sanwa Foods, Inc. v. United States,* 18 CIT ___, slip op. 94–76 at 4–5 (May 10, 1994). This conclusion is reinforced by the terms of GRI 3. It applies when "goods are, *prima facie,* classifiable under two or more headings * * *.". Here, the goods are not classifiable under two or more headings after the relevant Chapter Notes are analyzed in light of the relevant Explanatory Notes.

For these reasons, Pima Western's—and the government's—discussion in the briefs of the relative specificity of headings, and distinctions between *eo nomine* and use provisions, is not relevant to the Court's decision. A discussion of their substance would be *dictum,* in which the Court here declines to indulge.

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[3] In its Memorandum In Support of Motion for Summary Judgment, Pima Western purports to quote Heading 3301 as follows: "Heading 3301 provides for 'essential oils *inter alia* prepared oleoresins'." Memo. at p. 5. Heading 3301 contains no language about oleoresins. Counsel should limit quotations to the actual language of the matter being quoted, and make note of the distinction between headings and subheadings, where the actual mention of oleoresins is made. This distinction is necessary for proper interpretation of HTSUS.

C

WHEN GRI 1 ANALYSIS OF THE HEADINGS IS DISPOSITIVE, THE COURT DOES NOT PERFORM GRI 6'S ANALYSIS OF SUBHEADINGS

Similarly, Pima Western's lengthy argument comparing subheadings 3203.00.50 and 3301.30.10 is beside the point. GRI 1 and GRI 6 instruct the court to classify products first according to the HTSUS headings. Only if the headings are not dispositive are subheadings compared. The Court finds that the headings are dispositive of the dispute here. Therefore, it does not reach the comparison of subheadings.

D

THE CLEAR INTENT OF HTSUS DOES NOT SUPPORT PIMA WESTERN'S ASSERTED CLASSIFICATION

Pima Western also argues that the clear and literal intent of the HTSUS supports the classification that it seeks. Tariff acts must be construed to carry out the intent of the legislature, which is determined initially by looking at the language of the statute itself. *Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 89, 92–93, 673 F.2d 380, 382 (1982). Moreover, "the entire context of the statute must be considered and every effort made to give full force and effect to all language contained therein." *Dart Export Corp. v . United States,* 43 CCPA 64, 74, *cert. denied,* 352 U.S. 824–25 (1956). Thus, the Court cannot examine a heading or subheading of HTSUS in isolation to determine its meaning. We must examine it within the context of the entire statute, which here includes not only the headings and subheadings, but also the GRI's, Chapter Notes and Section Notes, *inter alia.* In this context, the intent of HTSUS supports the government's position.

E

STATISTICAL SUFFIXES ARE NOT PART OF THE LEGAL TEXT OF HTSUS AND THEREFORE ARE NOT DISPOSITIVE

Pima Western argues that since HTSUS 3301.30.10 provides expressly for "prepared oleoresins", and has a statistical suffix for "paprika", HTSUS 3301.30.10.50, Congress intended to include all oleoresins of paprika, eliminating further inquiry here. That argument is invalid.

First, the Court cannot limit its inquiry as Pima Western suggests. To do so would ignore the substantial explanatory material, e.g., the GRI's and Chapter Notes, that Congress included in the HTSUS legislation, and violate the Court's duty to review the statute as a whole. Without repeating it, the broader inquiry above leads to the conclusion that the legislative intent supports the Customs Service's classification.

Second, the existence of the statistical suffix for paprika under subheading 3301.30.10 for oleoresins does not provide conclusive evidence of legislative intent to include the coloring agent at issue here. Statistical annotations, including statistical suffixes, are not part of the legal text of the HTSUS. HTSUS Stat. Notes 2(a), 2(b). They are not included

among the appropriate references listed in GRI 1 and in the legislative history of the HTSUS. Therefore, they cannot be applied to forestall the examination of the whole of the HTSUS required of the Court. *See Asta Designs, Inc. v. United States,* 13 CIT 61, 66, 709 F. Supp. 1154, 1158 (1989) (decided under TSUS that the language of a statistical provision cannot be considered an *eo nomine* provision). Looking beyond the statistical suffix, as the Court must, the Court finds that the subheading manifestly does not include oleoresins of paprika formulated as coloring.

The Court notes in passing that Pima Western also erroneously suggests that the statistical suffix for oleoresin of paprika at 3301.10.30.50 would be rendered surplusage if the substance were classified elsewhere. This is not true. In its own brief and at oral argument, Pima Western admitted that oleoresin of paprika is formulated with certain "color and heat" values as a coloring agent, and with different such values as a flavoring agent. Plaintiff's Memorandum In Support of Motion for Summary Judgment at 6. While the matter need not be decided here, it is evident that the statistical suffix could be applicable if an oleoresin formulated as a flavoring agent were classifiable at 3301.10.30 and statistical suffix .50. Thus, it is evident from the HTSUS and the Explanatory Notes that oleoresin of paprika formulated as a coloring agent is classifiable at 3203.00.05, and that this would not necessarily render the statistical suffix surplusage.

F

THE COURT NEED NOT REFER TO TSUS IN INTERPRETING HTSUS HERE

Finally, Pima Western compares the former Tariff Schedules of the United States ("TSUS") to the current HTSUS to support its argument that legislative intent supports its suggested classification. The Conference Report on the Omnibus Trade Act of 1988 touches upon this issue:

> In light of the significant number and nature of changes in nomenclature from the TSUS to the HTS, decisions by the Customs Service and the courts interpreting the nomenclature under the TSUS are not to be deemed dispositive in interpreting the HTS. Nevertheless, on a case-by-case basis prior decisions should be considered instructive in interpreting the HTS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTS.

H. Conf. R. No. 576, at 549–50. This Court has, in the past, referred to TSUS to aid the interpretation of HTSUS. *See, e.g., Beloit Corp. v. United States,* 18 CIT ____, 843 F. Supp. 1489, 1495 *et seq.* (1994). There, the reference was undertaken in the course of reviewing legislative history because the HTSUS was ambiguous. *Id.* There is no similar need to resort to the TSUS here because the provisions of the HTSUS at issue are unambiguous. Rather, the HTSUS on its own terms leads to a clear outcome. Moreover, Pima Western itself admits that the nomenclature changed from the TSUS to the HTSUS. The Court therefore finds that

comparing the HTSUS with the TSUS is neither necessary nor enlightening.

CONCLUSION

For the foregoing reasons, the Court denies Plaintiff Pima Western's motion for summary judgment, grants Defendant United States' motion for summary judgment, and enters final judgment in favor of the United States.

(Slip Op. 96–18)

ROLLERBLADE, INC., PLAINTIFF *v.* UNITED STATES, DEFEDNANT

Court No. 91–12–00891

[Plaintiff's motion for summary judgment granted. Defendant's motion for summary judgment denied. Action over protest no. 3501–9–000058 dismissed for lack of jurisdiction. Judgment entered for Plaintiff.]

(Decided January 17, 1996)

Powell, Goldstein, Frazer & Murphy (Richard M. Belanger, Robert Torresen, Jr., D. Christine Wood) counsel for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *Bruce N. Stratvert,* Civil Division, Dept. of Justice, Commercial Litigation Branch; *Mark G. Nackman,* Office of Assistant Chief Counsel, U.S. Customs Service, of counsel, for Defendant.

OPINION

POGUE, *Judge:* Invoking this Court's jurisdiction under 28 U.S.C. § 1581(a) (1988), Plaintiff challenges Customs' classification of certain merchandise imported from August 3, 1988 to November 27, 1990 and described as in-line roller skate boots. The Court has jurisdiction over all but one of Plaintiff's twenty-three protests, and, for the following reasons, enters summary judgment for Plaintiff.

BACKGROUND

Prior to January 1, 1989, U.S. Customs classified imported merchandise using the Tariff Schedules of the United States ("TSUS"). Customs classified the merchandise imported by the Plaintiff prior to January 1, 1989 as "other athletic footwear" under item 700.5610, TSUS.[1] As of January 1, 1989, Customs began to utilize the Harmonized Tariff Schedules of the United States ("HTSUS") in classifying merchandise.

1

700.5610	Athletic footwear: Other: For men

The rate of duty for this classification is 6 percent *ad valorem.*

Customs classified the merchandise imported by Plaintiff after January 1, 1989 as "other footwear" under subheading 6402.19.10, HTSUS.[2]

Plaintiff claims that the proper classification for the merchandise entered prior to January 1, 1989 is under item 734.90, TSUS, which covers "roller skates and parts thereof."[3] For the merchandise entered on or after January 1, 1989, Plaintiff claims that the proper classification is "roller skates and parts and accessories thereof" under subheading 9506.70.20, HTSUS.[4]

Both parties contend that there is no genuine issue of material fact, and move for summary judgment pursuant to USCIT R. 56.

JURISDICTION

Defendant does not challenge this Court's jurisdiction over twenty-two of the Plaintiff's twenty-three protests. In its answer, however, Defendant avers that one of Plaintiff's twenty-three protests, no. 3501–9–000058, was untimely filed.

Protest no. 3501–9–000058 was filed on June 23, 1989 against the liquidation of September 2, 1988. The statute requires that a protest be filed within ninety days after notice of liquidation. Section 514(c)(3) of the Tariff Act of 1930, 19 U.S.C. § 1514(c)(3) (1994). Protests not filed within the ninety-day statutory period are untimely, and consequently, the Court *sua sponte* dismisses the civil action based on protest no. 3501–9–000058 (and the covered entries) for lack of jurisdiction. *See Schering Corp. v. United States,* 67 CCPA 83, 86–88, C.A.D. 1250, 626 F.2d 162 (1980); *Group Italglass U.S.A., Inc. v. United States,* 17 CIT 1205, 1206 (1993).[5]

The Court, however, maintains jurisdiction over Plaintiff's action as to the other protests.

UNDISPUTED FACTS

The merchandise consists of rigid, molded plastic (polyurethane) boots which include a removable, padded vinyl liner. The bottom portion

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2

6402	Other footwear with outer soles and uppers of rubber or plastics:
6402.11.00	Sports footwear:
6402.19	Other:
6402.19.10	Having uppers of which over 90 percent of the external surface area * * * is rubber or plastics * * *

The rate of duty for this classification is 6 percent *ad valorem.*

For most of the entries made on or after Jan. 1, 1989, the Customs Service classified the merchandise as "waterproof footwear" under item 6401.99.80, HTSUS. The rate of duty for this classification is 6 percent *ad valorem.*

Customs concedes that this classification is not appropriate, but argues that no reliquidation is required as the appropriate classification, 6402.19.10, carries the same duty. (Defendant's Memorandum at 11, note 5.)

3

734.9000	Skates (including footwear with skates permanently attached), and parts thereof: Roller skates, and parts thereof

Merchandise classified under this provision is free of duty.

4

9506.70.20	Roller skates and parts and accessories thereof

Merchandise classified under this provision is free of duty.

5 When jurisdiction is challenged, Plaintiff has the burden of establishing it. *Hambro Automotive Corp. v. United States,* 66 CCPA 113, 117, C.A.D. 1231, 603 F.2d 850, 853 (1979) (citations omitted). Plaintiff has not brought to the attention of this Court any legal or factual reason to establish jurisdiction.

of each boot is molded to accommodate the permanent attachment of wheel frames and wheels.[6]

The merchandise is not, however, imported with wheel frames or wheels. Rather, after the boots are imported, wheel frames and wheels are riveted to the bottom of the boots, resulting in the end product of in-line skates. The merchandise at issue cannot be used for any purpose other than as the boot component of in-line skates. Both parties agree that the boots are unsuitable for walking. The merchandise is not marketed separately nor sold directly to consumers.

Plaintiff has demonstrated that it imports the polyurethane shells solely for use in the manufacture of in-line roller skates. During the manufacturing process the wheel frame is riveted permanently to the bottom of the shell. (Plaintiff's Memorandum, Miller deposition, Exhibit C at 9–10.)[7]

DISCUSSION

I

Customs' classification is before this Court for *de novo* review pursuant to 28 U.S.C. § 2638 (1988). Under 28 U.S.C. § 2639(a)(1) (1988), Customs' classification is presumed to be correct, and the burden of proof is upon the party challenging the classification. Thus, in moving for summary judgment, Rollerblade bears the ultimate burden of persuasion on all elements of its asserted claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *Glaverbel Société Anonyme v. Northlake Marketing & Supply, Inc.*, 45 F.3d 1550 (Fed. Cir. 1995). The Plaintiff can meet its burden by demonstrating that its classification "may have faults and yet still [is] a *better* classification than the government's." *Jarvis Clark Co. v. United States*, 2 Fed. Cir.(T) 70, 75, 733 F.2d 873, 878, *reh'g denied*, 2 Fed. Cir (T) 97 (1984).

In considering a motion for summary judgment, however, the evidence must be considered in a light most favorable to the non-moving party, drawing all reasonable inferences in its favor, as well as all doubts over factual issues. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Anderson*, 477 U.S. at 253; *Mingus*, 812 F.2d at 1390–91. Nevertheless, "when a motion for summary judgment is made and supported * * * an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but * * * must set forth specific facts showing that there is a genuine issue for trial." USCIT R. 56(f). Consequently,

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[6] *Compare* Plaintiff's Statement of Material Facts at 3, ¶ 7 ("The merchandise * * * consists of rigid, molded plastic (polyurethane) shell cuff assemblies which include a removable, padded vinyl liner. The bottom portion of each shell is molded to Rollerblade's specifications to accommodate the permanent attachment of wheel frames and wheels * * *.") *with* Defendant's Response to Plaintiff's Statement of Material Facts at 2, ¶ 7 ("Admits, except denies that the imported merchandise is properly describable as "shell cuff assemblies" or "shells;" rather it is describable as "skating boots," or "skate boots," or "boots," or "shoes," or "footwear".")

[7] Defendant does not offer any evidence to the contrary nor any counter argument. Defendant only asserts that Rollerblade has not met the burden of proving that commercial meaning (definite, uniform and general) should prevail over the common meaning because the testimony does not establish commercial designation of the merchandise as "shell cuff assemblies" so as to preclude classification as "footwear." (Defendant's Memorandum at 23.)

because there are no factual issues in dispute which might affect the result of this action, summary judgment is appropriate.

II

The issue presented is whether the imported merchandise should be classified as a "part" of a roller skate or as "footwear" as those terms are used within the tariff schedules.

"[A] 'part' of an article is something necessary to the completion of that article. It is an integral, constituent, or component part, without which the article to which it is to be joined, could not *function as such article." United States v. Willoughby Camera Stores, Inc.*, 21 CCPA 322, 324, T.D. 46851 (1933), *cert. denied*, 292 U.S. 640 (1933) (citations omitted, emphasis in the original). More recently, courts have included in the definition of "parts" an article which is "dedicated to a specific use" in conjunction with another item even though its use is optional, *United States v. Antonio Pompeo*, 43 CCPA 9, 14, C.A.D. 602 (1955), and have considered "[t]he nature, function and purpose of an item in relation to the article to which it is attached or designed to serve," *Ideal Toy Corporation v. United States*, 58 CCPA 9, 13, 433 F.2d 801 (1970) (citations omitted).

It is undisputed that the merchandise at issue here is integral to the manufacture of in-line roller skates. Indeed, without the boot, the product would not be complete, and could not function as a roller skate. In addition, Plaintiff has demonstrated that the manufacturing process involves the riveting of the wheel frame to the bottom of the boot. Accordingly, these boots are clearly designed and dedicated to use as parts of a roller skate. Thus, the merchandise at issue here is classifiable as parts of roller skates, *prima facie*, under both tariff schedules.

At the same time, this Court also recognizes that the merchandise—in its condition as imported—is classifiable as "footwear," because the merchandise meets the broad definition contained within the tariff schedules.[8]

Consequently, because the merchandise is described in both provisions, this Court must determine which of the two classifications is more specific. When an imported article is described in two or more provisions of the schedules, both General Headnote 10(c)[9] of the TSUS and General Rule of Interpretation 3(a)[10] of the HTSUS require this Court to determine which of the two classifications is more specific. Similarly, under both TSUS General Headnote 10(ij) and HTSUS Add. R. of Interpr. 1(c), a provision for parts of an article covers products solely or principally used as a part of such article, but does not prevail over a specific provision for such part (or accessory).

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[8] The provisions under which the merchandise was classified cover footwear "having uppers of which over 90 percent * * * is rubber or plastics." *Cf.* 700.56, TSUS and 6402.19.10, HTSUS.

[9] TSUS General Headnote 10(c) provides that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; * * *."

[10] HTSUS GRI 3(a) provides, when goods are *prima facie* classifiable under two or more headings, that "the heading which provides the most specific description shall be preferred to headings providing a more general description * * *."

Defendant argues that the footwear provisions under 700.56, TSUS and 6402.19.10, HTSUS are *eo nomine* provisions that specifically describe the merchandise by name. Therefore, Defendant argues, the assembly of the Rollerblade boot to function as support and protection for the foot is irrelevant to the classification of that merchandise. (Defendant's Reply Brief at 4.)[11]

The Court disagrees. "An *eo nomine* designation is one which describes a commodity by a specific name, usually one well known to commerce." *United States v. Paul M.W. Bruckmann,* 65 CCPA 90, C.A.D. 1211, 582 F.2d 622 (1978). "Footwear," however, is not a term that describes a commodity by a specific name. Rather, it is a term that includes a wide range of different products. *See Webster's Third New International Dictionary* at 886 (1993).[12] For this reason, a whole part of each of the tariff schedules is dedicated to different products that fall within this wide category. As a result, the term "footwear," as it is employed in the statutes, cannot be considered either an *eo nomine* provision or a specific one. Moreover, "use cannot be ignored in determining whether an article falls within an *eo nomine* tariff provision." *United States v. Quon Quon Company,* 46 CCPA 70, 72–73 (1959). In this case, the final use of the merchandise would lead the Court to classify it as a part of a "roller skate" rather than as "footwear."

Finally, Defendant's argument disregards this Court's earlier holdings that wearing apparel provisions, and therefore footwear provisions, are not *eo nomine* but rather use provisions. *Bata Shoe Co., Inc. v. United States,* 6 Cust. Ct. 50, C.D. 423 (1941); *Westminster Corp. v. United States,* 78 Cust. Ct. 22, C.D. 4687, 432 F. Supp. 1055 (1977).

On the contrary, the term "roller skates" constitutes both an *eo nomine* provision and a specific one. Indeed, this term appears *ictu oculi* to represent a specific designation of a product well known to commerce. When Congress has created an *eo nomine* classification and imposed a duty by such name, general terms, although sufficiently broad to include the article, are not applicable to it. *See Arthur v. Lahey,* 96 U.S. 112 (1878); *C.T. Takahashi & Co., Inc. v. United States,* 74 Cust. Ct. 38, C.D. 4583 (1975); *W & J Sloane, Inc. v. United States,* 76 Cust. Ct. 62, C.D. 4636, 408 F. Supp. 1392 (1976). Therefore, the tariff provision for parts of "roller skates" more specifically describes the merchandise than the use provision covering "footwear."

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[11] In support of this assertion, Defendant cites *Westinghouse Electric International Co. v. United States,* 28 Cust. Ct. 209, C.D. 1411 (1952); *Fairchild Camera & Instrument Corp., Inter-Maritime Forwarding Co., Inc. v. United States,* 53 CCPA 122, C.A.D. 887 (1966).

The cases cited by Defendant examine the relationship between a provision for parts and a specific provision covering the article imported. Under *Westinghouse,* the final use of an article helps to determine whether a provision is more specific than a provision for parts. The final use of the merchandise here is as in-line roller skates. Additionally, under *Fairchild,* a provision for parts is not a use provision and is less specific than an *eo nomine* provision. Following this authority, Defendant argues that, because the footwear provision is an *eo nomine* provision, Plaintiff's proposed classification of the merchandise under parts of roller skates is less specific than the *eo nomine* footwear provision.

[12] Courts may rely upon their own understanding of the term used, and may consult dictionaries, scientific authorities, and other reliable sources of information. *Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 90, 92 (1982) (citations omitted); *Brookside Veneers, Ltd. v. United States,* 6 Fed. Cir. (T) 121, 846 F.2d 786, 789 (Fed. Cir. 1988), *cert. denied,* 488 U.S. 943; *see also Texaco Marine Services, Inc. v. United States,* 44 F.3d 1539 (Fed. Cir. 1994).

Defendant also directs the Court's attention to Headnote 1 of Schedule 7, Part 5, Subpart D (encompassing item 734.90, TSUS), which specifically excludes "footwear, other than footwear with skates permanently attached." (Defendant's Memorandum at 23–24.) Similarly, the Defendant emphasizes that Chapter 95 of the HTSUS does not cover "sports footwear (other than skating boots with ice or roller skates attached) of chapter 64."[13] Defendant argues that, because the merchandise is imported without skates permanently attached, it falls within the exception to the general exclusion of footwear from the "roller skate" provisions.

In fact, the provisions which the Defendant cites demonstrate the correctness of the Plaintiff's claim that the merchandise is *a part of a roller skate.* The plain language of the tariff schedule exclusion refers to "boots" or "footwear * * * with skates attached." If the merchandise excluded from the footwear classification includes the boot, then the boot is a part of the excluded product. The imported merchandise at issue here forms an integral part of the final roller skate. Therefore, it is excluded from the footwear classification.[14]

Moreover, if this were not the case, it would produce the anomaly that a party importing a *finished product,* wheels, boot and all, incurs no duty liability, whereas a party *assembling the wheels and boot in the U.S.* must pay duties. *See United States v. J.M. Lehman Co., Inc.,* 22 CCPA 106, 108, T.D. 47081 (1934) ("It would be anomalous to admit the finished product at a lower rate of duty than applies to the material from which it is produced.").

Accordingly, although footwear encompasses boots, the general term "footwear" is inapplicable in this case because the more specific "roller skate" classification applies.

CONCLUSION

This Court will dismiss Plaintiff's action as to the protest no. 3501–9–000058, and grant summary judgment for the Plaintiff as to the other protests. Defendant's motion for summary judgment is denied. Judgment will be entered and classification made in accordance with this opinion.

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[13] HTSUS Chapter 95, Note 1(g).

[14] The history of these provisions supports this reading. Under the Tariff Act of 1930, Par. 1530, imported skates were dutiable as "ice skates, and parts thereof." Roller skates were not mentioned in the statute. The *Summaries of Tariff Information* (1948) explained that most ice skates "are designed for permanent attachment to special skating shoes," and that "imported skates are dutiable [as skates] whether or not attached to shoes; the shoes are dutiable [as footwear]." The Tariff Classification Act of 1962, however, introduced a new provision, to cover "skates (including skates permanently attached to footwear), and parts thereof: Roller skates, and parts thereof." The *Tariff Classification Study* (1960), which is a prime source of legislative intent, states that the provision was modified to change the existing customs practice of having to separately value the footwear portion of the product and the blade or wheel portion of the product. The new schedule eliminated this practice "to relieve customs officials of the unnecessary burden of having to determine which part of the value of such imported skates is assignable to the footwear and which is assignable to the skates." *Tariff Classification Study,* Schedule 7, U.S. Tariff Commission at 285 (Nov. 15, 1960). Consequently, Congress expanded the provision for "skates" to include also the footwear subject to permanent attachment of skates, and also introduced a specific item for "roller skates, and parts thereof" which were not dutiable as footwear.

(Slip Op. 96–19)

MIDWEST OF CANON FALLS INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 92–03–00206

[Judgment entered for plaintiff in part, and for defendant in part.]

(Dated January 18, 1996)

Serko & Simon (Joel K. Simon and *Leibert L. Greenberg),* for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mikki Graves Walser);* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *Sheryl French),* of Counsel, for defendant.

OPINION

GOLDBERG, *Judge:* This matter is before the Court following trial *de novo.* It involves the proper tariff classification of approximately eighteen items typically used for decoration during holiday festivities,[1] and it calls upon the Court to interpret the scope of the term "ornament" as found in heading 9505 of the Harmonized Tariff Schedules of the United States (HTSUS). This Court holds that the term "ornament" does not require that an item hang, be inexpensive, or traditional in its motif. As to the classification of specific imports, the Court finds in favor of the plaintiff in part, and in favor of the defendant in part. The Court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

Midwest of Canon Falls Inc. ("Midwest") imports holiday related merchandise and then resells it to retailers. The merchandise at issue includes nutcrackers, stocking hangers, figurines of Saint Nicholas and crew, mugs and pitchers with a jack-o-lantern design, figurines of rabbits, heart-shaped metal wreaths, and turkey-shaped terra cotta planters. Generally, these items are advertised and sold only to consumers prior to the particular holiday with which they are associated, the vast majority being sold during the Christmas season.

The products were entered in 1990 and 1991. All of the products were liquidated in 1991. The United States Customs Service ("Customs") classified the products variously as earthenware ornamental ceramic articles, dolls, glassware, other items for Christmas festivities that are not ornaments, ceramic tableware and kitchenware articles, other ornaments of base metal, and other articles of plastics.

Midwest claims that the Christmas related items should be classified as Christmas ornaments or as other Christmas festive articles. Midwest argues that the Halloween, Thanksgiving, Valentine's Day, and Easter related items should be classified as other festive articles.

[1] The parties stipulated to a number of other items prior to entry of the Court's judgment, which are not discussed in this opinion.

DISCUSSION

I. *Definition of Christmas Ornament Under Heading 9505, HTSUS:*

Customs argues that the Christmas related imports may not be classified under heading 9505, HTSUS, as "ornaments" because items that fall within the scope of the term "ornament" must hang from a tree, are inexpensive, and traditionally are associated with Christmas. Plaintiff, on the other hand, claims that items do not need to meet all of these requirements to fall within the scope of the term "ornament." The Court agrees with plaintiff. Customs also argues that ornaments must be made of non-durable material. The Court need not decide this issue because it finds that all of the items at issue are made of non-durable material.

The meaning of a tariff term is a question of law. *Brookside Veneers, Ltd. v. United States,* 6 Fed. Cir. (T) 121, 124, 847 F.2d 786, 788, *cert. denied,* 488 U.S. 943 (1988). Courts interpret the tariff acts in order to carry out legislative intent. *Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 89, 673 F.2d 380 (1982). The first source for determining legislative intent is the statutory language. *United States v. Esso Standard Oil Co.,* 42 CCPA 144, 155 (1955). In ascertaining the plain meaning of a particular statutory term, the Court presumes that Congress frames tariff acts using the language of commerce. *Nylos Trading Co. v. United States,* 37 CCPA 71, 73 (1949). The Court also presumes that the commercial meaning of a tariff term coincides with its common meaning, in the absence of evidence to the contrary. *United States v. C.J. Tower & Sons,* 48 CCPA 87, 89 (1961). The Court may rely upon its own understanding, and consult standard lexicographic and scientific authorities to determine the common meaning of a tariff term. *Brookside Veneers,* 6 Fed. Cir. (T) at 125, 847 F.2d at 789.

This Court begins, therefore, by examining the statute. Heading 9505, HTSUS, uses the term "ornaments," without elaboration. The dictionary defines the term "ornament" to mean "something that lends grace or beauty: a decorative part or addition." *Webster's Third New International Dictionary* 1592 (Unabridged, 1986). *See also, e.g., Webster's New World Dictionary* 955 (3rd College ed. 1988) ("anything serving to adorn; decoration; embellishment"). No persuasive evidence was presented at trial that, among consumers and industry participants, the common or commercial meaning of the term "ornament" is restricted to inexpensive or traditional items. Yet, evidence presented at trial did demonstrate that the term "ornament" is often understood by consumers and industry participants to mean items that hang from a tree. However, the evidence failed to demonstrate that this interpretation was consistent. Based on the statutory language, as interpreted in light of dictionary definitions and the commercial meaning attached to the term "ornament" by consumers and industry participants, this Court will not impose the requirements that Customs proposes.

Customs' arguments are based largely on the Explanatory Notes. Explanatory Notes, while not controlling, may be used to clarify the

HTSUS. *Mita Copystar America v. Unites States*, ____ Fed. Cir. (T) ____, 21 F.3d 1079, 1082 (1994).

Customs argues that "ornament" should be limited to inexpensive items because the Explanatory Notes to heading 9505 provide examples of items made out of such materials as "paper, metal foil, glass fibre, etc." Explanatory Notes, 95.05(A)(1). The Court observes that the list of examples in the Explanatory Notes is not meant to be exhaustive. The Explanatory Notes merely state that festive articles, of which ornaments are a subgroup, "include" the examples given. *Id.* at 95.05(A). Also, heading 9505 explicitly covers additional materials not mentioned in the Explanatory Notes: glass, wood, and plastic. *See* 9505.10.10, 9505.10.15, and 9505.10.40, HTSUS. The only restriction as to the composition of articles classified under heading 9505 is found in the Chapter 95 Notes, which, unlike the Explanatory Notes, are controlling. The Chapter Notes state that precious metals, pearls, or precious stones may comprise only "minor constituents" of articles classified under heading 9505. Chapter 95 Notes, 2, HTSUS. None of the items at issue violate this restriction. The Court will not impose additional restrictions on constituent materials beyond those explicitly enumerated for the purpose of limiting the value of an item. Nor will the Court introduce a monetary restriction where none is present in the HTSUS, the Chapter Notes, or the Explanatory Notes.

Customs also argues that "ornament" should be limited to items having traditional Christmas themes because the Explanatory Notes state, by way of example, that items "traditionally used at Christmas" are included under the heading. Explanatory Notes, 95.05(A)(2). The Court is not persuaded by Customs' argument. The language of the Explanatory Notes is inclusive; neither the HTSUS nor the Explanatory Notes explicitly exclude ornaments of non-traditional themes or design. Explanatory Notes, 95.05(A).

Confining the term "ornament" to traditional themes also runs counter to commercial reality and consumer practices in the United States. Unrefuted evidence presented by the plaintiff at trial shows that during the holidays, people in the United States decorate their homes and Christmas trees with items having modern as well as traditional themes. Manufacturers design new decorative items each year. For instance, Midwest recently introduced Christmas decorations based on Disney movies such as The Lion King. Another example of this is the specialty nutcrackers, those portraying professionals and the like, which are displayed and sold principally, if not exclusively, at Christmas as Christmas decorations. Absent legislative intent to the contrary, the term "ornament" should be construed to embrace evolving consumer tastes. *See Atlas Copco North America, Inc. v. United States*, 17 CIT 1163, 1168, 837 F. Supp. 423, 426–27 (1993) ("It is conducive to the steady and predictable development of the tariff law that inventive improvements which continue to be known by a traditional name not be excluded from a class simply because of their new physical characteris-

tics."). This Court therefore refrains from confining the term "ornament" to items possessing themes "traditionally" associated with Christmas.

Customs also argues that the term "ornament" should be restricted to items that hang on trees. The basis of this argument is a list of examples found in the Explanatory Notes, which includes festoons, garlands, tinsel, and lanterns. Explanatory Notes, 95.05(A)(1). Customs contends that all of these are objects that hang on a Christmas tree. The Court disagrees that the term "ornament" should be confined to items that hang on trees. The Explanatory Note relied on by Customs specifies that festive articles "include" the above mentioned examples. Explanatory Notes, 95.05(A)(1). It does not suggest that this list is exhaustive of items that come within the term "ornament" or their characteristics. Moveover, in drafting the HTSUS, Congress demonstrated its intent to expand the definition of "ornament" to include items beyond those that hang on trees. The predecessor to the HTSUS, the Tariff Schedules of the United States (TSUS), contained item 772.95.00 entitled "Christmas tree ornaments." TSUS, 1986. In the HTSUS, Congress deleted the qualifier "tree."[2] Customs is asking this Court to read the term "tree" back into the statute. The Court declines to do so.

Finally, Customs argues that items that fall within the scope of the term "ornament" must be made of non-durable materials. The argument is based on the Explanatory Notes to heading 9505, which state that items falling within the heading are items "which in view of their intended use are generally made of non-durable material." Explanatory Notes, 95.05(A). The Court need not decide whether durability is a requirement. The present case primarily involves items made of materials that are explicitly covered by heading 9505, HTSUS: glass, wood, and plastic. *See* 9505.10.10, 9505.10.15, and 9505.10.40, HTSUS. Items that are made of materials explicitly enumerated under heading 9505, HTSUS, cannot be excluded from that heading on the basis of a restriction on materials contained in the Explanatory Notes. The other items do not appear to be made of durable materials. "Durable" is defined in the dictionary as "lasting in spite of hard wear or frequent use." *Webster's New World Dictionary* 422 (3rd College ed. 1988). Evidence presented at trial suggests that the other subject imports, the ceramics and figurines made of various resins, are not made of materials that enable them to withstand hard wear or frequent use. The single possible exception is the cast iron stocking hangers. Even the stocking hangers, however, are ornately painted, which, in view of their intended use as a decorative item during Christmas, indicates that they are not designed to withstand hard wear or frequent use. That all of the subject imports might survive many Christmas seasons because they are packed care-

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[2] The Court recognizes that other parts of the HTSUS refer to "Christmas tree ornaments" when referring to heading 9505, HTSUS. *See, e.g.*, Chapter 70 Notes, 1(f), HTSUS (excluding "Christmas tree ornaments or other articles of Chapter 95" from the glass and glassware heading). In this Court's view, these inconsistencies appear to be an oversight. Congressional intent is demonstrated more clearly by changing Chapter 95, rather than its failure to modify all cross-references to it in the HTSUS.

fully and stored at the end of each season does not transform the imports into items made of durable materials.

Accordingly, the Court holds that the term "ornament" as used in heading 9505, HTSUS, does not require items to hang, be inexpensive, or traditional in theme or design.

II. *Classification:*

The Court now turns to the appropriate classification of the various items at issue.

Customs' tariff classification decisions are presumed to be correct; the importer has the burden of proving otherwise. 28 U.S.C. § 2639(a)(1) (1988). To determine whether the importer has overcome this presumption, the Court must consider whether Customs' classification is correct, both independently and in comparison with the importer's proposed alternative. *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878, *reh'g denied,* 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984).

A. *Subheading 9502.10.40, HTSUS: Nutcrackers, Wooden Pull Toys, Toy Smokers, Porcelain and Fabric Gentleman Santa, Mrs. Claus Figures Made of Fabric Mache:*

The subject imports are miniature wooden pull toys in the form of an ice skater, which can hang from a tree by its string; toy smokers, which are wooden figures of Santa Claus that are hollowed out to burn incense and expel the smoke through a pipe which the figure "smokes;" a porcelain and fabric mache Santa in English gentleman's clothing; a fabric mache Mrs. Claus figure; and nutcrackers, items popularized by the ballet The Nutcracker. Of the over one hundred models of nutcrackers that Midwest imports, only fifteen are Santa Claus or Christmas elf figures. Approximately fifty four are traditional soldier or king nutcrackers of various nationalities. The rest are specialty nutcrackers which portray such figures as American presidents, athletes, and professionals. All of the items are three-dimensional figures, representing either imaginary or real human beings in caricature form.

Customs classified the imports as "dolls" not over 33 centimeters in height under subheading 9502.10.40, HTSUS, and imposed a duty of 12% *ad valorem.* Plaintiff argues that the nutcrackers should be classified as Christmas ornaments made of wood under subheading 9505.10.15, HTSUS, which carries a tariff of 5.1%, and that the other imports should be classified as Christmas ornaments other than those made of wood or glass under subheading 9505.10.25, HTSUS, which carries a tariff of 5%.

In determining whether Customs properly classified the imports as "dolls," the first matter for determination is whether the imports are within the common meaning of the term "doll." The Court concludes that they are classifiable as dolls.

The definition of "doll" is broad. Dolls have many uses. For tariff classification purposes, the term "doll" is

> not confined to playthings for children but includes a wide range of other articles including but not limited to dolls for ornamentation such as boudoir dolls, souvenir or prize dolls, dolls for display or advertising purposes, and dolls sold as gag items, bar gadgets, adult novelties, etc.

Russ Berrie & Co. v. United States, 76 Cust. Ct. 218, 223, 417 F. Supp. 1035, 1039 (1976) (citations omitted). *See also,* Explanatory Notes, 95.02. Dolls may be used for ornamentation, decoration, art, and religious observance. *Russ Berrie,* 76 Cust. Ct. at 225–226, 417 F. Supp. at 1041 (citing various dictionary and encyclopedia sources). Dolls are representations of humans, in either realistic or caricature form. Explanatory Notes, 95.02. Dolls typically are made out of the same materials as the imports at issue: plastics, fabric, ceramics, wood, and paper mache. *Id.*

Given the broad definition of the tariff classification "dolls," both in terms of physical characteristics and the variety of their uses, the Court finds that the sample products presented all come within the common definition of the term.

The Court next considers plaintiff's proposed classification. Plaintiff argues persuasively that all of these items should be classified as Christmas ornaments. Evidence presented at trial shows that the items at issue are principally used to decorate the house or tree during the Christmas holiday season. The nutcrackers, for instance, frequently are given as Christmas gifts and then utilized by the recipient to decorate his or her home during Christmas. Based on the broad scope of the term "ornament" enunciated in Part I of this opinion, the Court finds that the items at issue are described accurately as Christmas ornaments.

The Court is presented with a case where the items can be classified either as dolls or as ornaments. Where an item is described by two headings, the Court is instructed to select the heading which provides the most specific description. General Rules of Interpretation (GRI) 3(a), HTSUS.

It is well established that the tariff classification "dolls" is an *eo nomine* provision. *Russ Berrie,* 76 Cust. Ct. at 223, 417 F. Supp. at 1039. An *eo nomine* provision is one which describes merchandise by a specific name, usually one well known in the trade, which includes all forms of the article as if each were provided for by name in the tariff provisions. *Wregg Imports v. United States,* 10 CIT 679, 681 (1986). The tariff provision for Christmas ornaments, on the other hand, is best characterized as a use provision because the defining feature of an ornament is implied by its use.

A number of cases decided under the TSUS recognized a general rule of statutory construction that a use heading generally was more specific than an *eo nomine* heading. *See, e.g., Hartog Foods Int'l Inc. v. United States,* 15 CIT 475 (1991); *United States v. Siemens America, Inc.,* 68

CCPA 62, 653 F.2d 471 (1981), *cert. denied,* 454 U.S. 1150 (1982); *Rollix Bearing, Inc. v. United States,* 15 CIT 11, 757 F. Supp. 1412 (1991); *United States v. Snow's United States Sample Express Co.,* 8 Ct. Cust. App. 351 (1918). Cases decided under the TSUS, however, are not controlling for purposes of interpreting the HTSUS. Report of the Joint Committee on the Omnibus Trade and Competitiveness Act of 1988, H. Conf. R. No. 100–576, 100th Cong., 2d Sess. at 549–50.

Rather than adopting any rule for deciding between *eo nomine* and use classifications under the HTSUS, the Court will determine which classification is more specific based on all the facts and circumstances. First, the Court consults the Chapter Notes. It finds that these provide no guidance in this case. Next, the Court examines the Explanatory Notes. *See Totes, Inc. v. United States,* ____ Fed. Cir. (T) ____, 69 F.3d 495, 499 (1995). The Court finds that nothing in the Explanatory Notes, other than that already discussed, suggests that either classification more specifically describes the items at issue.

As such, the Court will apply the factors delineated in *United States v. Carborundum Co.,* 63 CCPA 98, 536 F.2d 373, *cert. denied* 429 U.S. 979 (1976), for classifying imports under the most specific heading: (1) the general physical characteristics of the merchandise; (2) the use, if any, in the same manner as merchandise which defines the class; (3) the expectations of the purchasers of the merchandise; (4) the channels of trade in which the merchandise moves; and (5) the environment of the sale of the merchandise (i.e. accompanying accessories and the manner in which the merchandise is advertised and displayed). In applying these factors, the Court notes that no single factor is determinative, and none are intended to be requirements for coming within any particular heading.

In the present case, application of the *Carborundum* factors suggests that the items at issue are more properly classified as ornaments than as dolls. In almost all cases, the general physical characteristics of the items include their motif in a Christmas theme. The single exception to this is the non-traditional nutcrackers which portray various professionals, athletic pursuits and other figures. As for the use factor, the evidence presented at trial establishes that all of the items are principally, if not exclusively, used only during the holiday season for the specific purpose of decorating or ornamenting the home or Christmas tree. *See* U.S. GRI 1(a), HTSUS. Consumer expectations are indicated by the items' lack of functionality other than as decorative items, and their lack of suitability as decorative items outside the Christmas holiday period. The channels of trade in which the items are sold are defined primarily by marketing and sales during the months preceding the holiday season. The environment of sale includes advertising the items in special holiday catalogues and displaying them in separate holiday sections of retail stores. Thus, all the *Carborundum* factors favor classifying all the subject imports as Christmas ornaments, with the exception of the physical characteristics of the non-traditional nutcrackers.

Finally, in evaluating an *eo nomine* provision vis-a-vis a use designation, the Court takes into account the breadth of the name classification. Breadth undermines specificity. Where an *eo nomine* provision encompasses more and more disparate items, almost without limit, it necessarily begins to lose its specificity. "Dolls" is a broad classification that covers many disparate items. *See, e.g., Russ Berrie,* 76 Cust. Ct. at 224–5, 417 F. Supp. at 1035 ("Perhaps because the variety is so vast, the courts have not been able to render a comprehensive definition of the term 'doll', nor have they been able to '* * * make any all-embracing finding as to what is a doll or to hold that all small figures are dolls * * *.'") (quoting *Louis Wolf & Co. v. United States,* 15 Cust. Ct. 156, 161 (1945)); *House of Lloyd, Inc. v. United States,* 13 CIT 414, 416 (1989) ("The court cannot accept a blanket rule that every decorative article with some doll-like feature is simply a doll."). The breadth of the *eo nomine* provision "dolls" supports classification of the items at issue as ornaments.

Because the *Carborundum* factors as applied to the subject imports weigh so overwhelmingly in favor of one heading over another, and because the alternative *eo nomine* provision is defined so broadly as to undermine its specificity as to the items at issue, this Court holds that the more specific classification is that for Christmas ornaments.

Because the nutcrackers, wooden pull toys, and toy smokers are made of wood, they are classified properly as other Christmas ornaments of wood under subheading 9505.10.15, HTSUS. The porcelain and fabric mache Santa and the fabric mache Mrs. Claus are classified properly as other Christmas ornaments under subheading 9505.10.25, HTSUS.

B. *Subheading 9505.10.50, HTSUS: Cast Iron Stocking Hangers:*

The subject imports are cast iron figures of Santa Claus or other Christmas type scenes that sit on a shelf or mantle, with a hook hanging over the ledge to suspend a Christmas stocking. These can support up to approximately four pounds of weight.

Customs classified the items as other articles for Christmas festivities under subheading 9505.10.50, HTSUS, and imposed a tariff of 5.8%. Plaintiff urges that the merchandise should be classified as other Christmas ornaments under subheading 9505.10.25, HTSUS, which carries a tariff of 5%.

Because Customs classified these items under a residual subheading, other articles for Christmas festivities, the first issue is whether the imports come within the scope of the term "ornament." The Court finds that they do. These items adorn the house during Christmas. They complement another Christmas ornament, a Christmas stocking. They are painted in Christmas colors, and it is clear from viewing samples that their decorativeness is as important as their functionality. Their decorativeness is one reason these hangers are superior to hanging stockings by other means.

Although the hangers can be classified as either Christmas ornaments, or as other articles for Christmas festivities, the Court finds that

the more specific classification is Christmas ornaments because the term "ornament" is narrow and better describes the hangers in comparison to the residual classification. GRI 3(a), HTSUS. Plaintiff therefore satisfies its burden of showing that these items were classified erroneously by Customs, and has demonstrated that subheading 9505.10.25, HTSUS, is the correct classification for these items.

C. *Subheading 6913.90.50, HTSUS: Terra Cotta Turkey Container, Earthenware Rabbit with Carrot:*

The subject imports are ceramic articles shaped either as turkeys, or as rabbits. The turkeys are hollowed in the middle, and are useful as planters or pen holders. The rabbits serve no purpose other than decoration.

Customs classified these items as statuettes and other ornamental ceramic articles of earthenware under subheading 6913.90.50, HTSUS, and imposed a tariff of 7%. Plaintiff urges that the terra cotta turkey container and the rabbit should be classified as other festive articles under subheading 9505.90.60, HTSUS, which carries a tariff of 3.1%.

The first matter for determination is whether the imports are within the common meaning of the term "ornamental ceramic articles." The Court finds that they are classifiable under Customs' tariff provision. They are made of ceramic and their purpose is to adorn the home. The Explanatory Notes indicate that the classification for ornamental ceramic articles "covers a wide range of ceramic articles of the type designed essentially for the interior decoration of homes * * * and outdoor ornaments (e.g., garden ornaments)." Explanatory Notes, 69.13. They include articles which have "no utility value but are wholly ornamental, and articles whose only usefulness is to support or contain other decorative articles or to add to their decorative effect." *Id.* at 69.13(A). Also, articles that are useful only for containing knick-knacks are ornamental for purposes of subheading 6913.90.50. *See* Explanatory Notes, 69.13(B) ("ornaments incorporating a purely incidental tray or container usable as a trinket dish or ashtray" are classifiable under heading 6913, HTSUS). The rabbits have no function other than as ornamentation. The turkey containers are hollowed to support other decorative items, such as a plant. The turkey containers also could be used as a trinket dish. Both the rabbits and the turkey containers are, therefore, classifiable as ornamental ceramic articles.

Plaintiff argues that these items should be classified as festive articles because the items are associated closely with Thanksgiving and Easter. In addition, plaintiff argues that the Chapter Notes exclude items that are covered under Chapter 95 from defendant's classification, ornamental ceramic articles. Chapter 69 Notes, 2(ij), HTSUS. This Court finds, however, that these articles are not properly classified under Chapter 95 as festive articles. Although all of the items feature animals that are associated with a particular holiday or season, the items are not so peculiarly stylized so as to limit their use to that holiday. Plaintiff's own witness testified that Midwest designed the rabbit in response to customer

requests for a decorative item that could be used year-around. The turkey container is likewise suitable for year-around use.

As to both of these items, the plaintiff has failed to satisfy its burden. Customs correctly classified these items as other ornamental ceramic articles under subheading 6913.90.50, HTSUS.

D. *Subheading 8306.29.00, HTSUS: Heart-Shaped Wreath:*

The subject import is a metal wreath with dozens of small, heart-shaped decorations attached to it, painted bright red, with a hook, allowing the item to hang from a wall. The importer advertises the item to retailers in a catalogue that features Valentine's Day and Easter products. The wreath was designed by Midwest for decorating the home on Valentine's Day. Plaintiff's witnesses testified that the wreaths could be given year-around, but that they would be difficult to find in stores outside the Valentine's Day season, which is the only time they are offered to consumers. Inspection of the wreath confirms testimony as to their design and purpose.

Customs classified the wreath as statuettes and other ornaments of base metal under subheading 8306.29.00, HTSUS, and imposed a tariff of 5%. Plaintiff contends that the wreath is classified more appropriately as other festive articles under subheading 9505.90.60, HTSUS, which carries a tariff of 3.1%.

The wreath is described accurately by Customs' classification. The item is an ornament or decoration of base metal, designed for use around the home. The Explanatory Notes confirm that this heading is for "ornaments of base metal * * * of a kind designed essentially for decoration, e.g., in homes." Explanatory Notes, 83.06(B).

Plaintiff's proposed subheading, other festive articles under subheading 9505.90.60, HTSUS, also describes the wreath accurately. According to the Explanatory Notes to plaintiff's proposed subheading, decorations "which are traditionally associated with a particular festival are also classified [under heading 9505]." Explanatory Notes, 95.05(A)(1). Although the wreath itself is a modern innovation, the heart shape and the color red are traditionally associated with Valentine's Day.

The wreath could be classified under either Customs' or plaintiff's classification. Because heading 9505 is intended for ornamental articles associated with festivals, the Court finds it to be a more specific heading than heading 8306, statuettes or ornaments of base metal. In this regard, the Court notes that the Explanatory Notes anticipate that ornaments more specifically described by other headings, such as ornaments associated with particular festivals, are properly excluded from heading 8306. *See* Explanatory Notes, 83.06(B) ("It should be noted that the group does not include articles of more specific headings of the Nomenclature, even if those articles are suited by their nature or finish as ornaments."). The appropriate classification for the items at issue is, therefore, subheading 9505.90.60, HTSUS.

E. *Subheadings 6912.00.44 and 6912.00.48, HTSUS: Jack-O-Lantern Earthenware Mug and Jack-O-Lantern Earthenware Pitcher:*

The subject imports are mugs and pitchers made of glazed ceramic, with depictions of jack-o-lanterns. These items are painted in orange and black, colors typically associated with Halloween.

Customs classified the mugs as mugs and other steins of the ceramic tableware, kitchenware, and other household articles section under subheading 6912.00.44, HTSUS, and imposed a tariff of 13.5%. Customs classified the pitchers as other ceramic tableware, kitchenware, and other household articles under subheading 6912.00.48, HTSUS, and imposed a tariff of 11.5%. Plaintiff contends that these items are classified more appropriately as other festive articles under subheading 9505.90.60, HTSUS, which carries a tariff of 3.1%.

The first issue for determination is whether the subject imports are accurately described by Customs' classification. The Court finds that they are. The subject imports are functional and, according to the Explanatory Notes, heading 6912 applies to tableware that is functional. *See* Explanatory Notes, 69.12. The Explanatory Notes state that ceramic tableware should be classified as functional tableware under heading 6912 where the "tableware and domestic utensils are designed essentially to serve useful purposes, and any decoration is usually secondary so as not to impair the usefulness. If, therefore, such decorated articles serve a useful purpose no less efficiently than their plainer counterparts, they are classified in heading * * * [6912 as functional ceramic tableware]." Explanatory Notes, 69.13(B).

The subject imports are within Customs' classification. The items are tableware made of ceramic. Also, the items are functional within the meaning of heading 6912. Plaintiff argues that the pitcher and mug are primarily decorative because the items were not designed to withstand daily, year-around use. That the items are decorated and slightly more fragile does not substantially impair their usefulness. The items are classifiable under Customs' tariff provision.

Plaintiff argues that these items should be classified as other festive articles. The Court does not agree. Although the motif of the mug and plate associate them with Halloween, heading 9505 nevertheless appears ill-suited to these particular items. The examples of items coming under heading 9505 as described by the Explanatory Notes are all non-functional items: false ears, cardboard trumpets, artificial snow, etc. Explanatory Notes, 95.05(A)(1). In addition, the HTSUS provides heading 6913 as the appropriate heading for decorative tableware. The Explanatory Notes do not contemplate plaintiff's proposed classification as a possible classification for tableware, functional or decorative. *See* Explanatory Notes, 69.13(B).

The Court observes that heading 6913, HTSUS, which the Court considers *sua sponte,* is not an appropriate classification because it is only for items whose usefulness is subordinate to their ornamental character. Explanatory Notes, 69.13(B). Examples of purely decorative table-

ware include miniatures, trays molded in relief "so that their usefulness is virtually nullified," and "ornaments incorporating a purely incidental tray or container usable as a trinket dish or ashtray." *Id.* The items at issue here are functional in nature; heading 6913 is an inappropriate classification.

The Court holds that Customs properly classified the pitchers and the mugs under subheadings 6912.00.48 and 6912.00.44, HTSUS, respectively.

F. *Subheading 7013.99.50, HTSUS: Christmas and Easter Water Globes:*

The subject imports are glass globes which create the effect of a snow storm when shaken. The globes contain water, a figure of Santa Claus or a bunny, and white matter simulating snow. The globes' bases are made of resin and are decorated in colors associated with Christmas or Easter. The bases often support other figures that form part of the item.

Customs classified the globes as other glassware of a kind used for table, kitchen, toilet, and office indoor decoration with a value of between $0.30 to $3.00 each under subheading 7013.99.50, HTSUS, and imposed a tariff of 30%. Plaintiff contends that the globes should be classified as other Christmas ornaments under subheading 9505.10.25, HTSUS, with a tariff of 5%; or, alternatively, as other articles of plastics under subheading 3926.90.90, HTSUS, with a tariff of 5.3%.

Customs argues that GRI 3(b) controls the classification of these globes because they are made from a composite of different materials. Pursuant to GRI 3(b), plaintiff argues that the essential character of the globes are defined by the water globe portion. The Court believes, however, that these items can be classified pursuant to GRI 3(a), which directs the Court to select the classification that most specifically describes the product. The items are not defined only by the globe portion. The base, in terms of size, weight, and decoration, lends substantial character to the items at issue. The items presented at trial demonstrate that the base is often the heaviest portion of the item; and it may have an independent figurine attached to it that is often larger than the water globe.[3] No one single feature defines the essential character of the globes. GRI 3(b) cannot guide this determination if the product can be classified more descriptively as a whole unit. If a determination under GRI 3(a) is possible, it controls.

The Court next considers whether the subject imports are within the common meaning of the term "glassware." The Explanatory Notes indicate that "glassware" has a broad definition. It may include paperweights, inkwells, book ends, containers, ashtrays, and souvenirs bearing views. Explanatory Notes, 70.13(3), (4). Given this broad definition, these items come within the term "glassware."

Plaintiff contends that the globes should be categorized as other Christmas ornaments; or, alternatively, as other articles of plastics.

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[3] This Court expresses no opinion regarding water globes that are not at issue in this case, where the motif is not associated with a holiday and the base of the item does not represent a substantial portion of the item.

Addressing the latter first, the Court determines that subheading 3926.90.90, HTSUS, for other articles of plastic, bears no relationship to the item described. The articles listed under heading 3926 are mostly industrial articles and miscellaneous goods that defy better categorization. "Other articles of plastics" is simply not a descriptive category for the items at issue. Moreover, the Chapter 39 Notes explicitly exclude festive articles from its coverage. Chapter 39 Notes, 2(u), HTSUS. The Court finds that plaintiff has failed to demonstrate that subheading 3926.90.90, HTSUS, provides the more specific description of the items at issue.

The Court now turns to plaintiff's alternative proposed classification, other Christmas ornaments under subheading 9505.10.25, HTSUS. Evidence presented by plaintiff at trial demonstrates that the water globes are marketed seasonally and are decorated in motifs associated with either Christmas or Easter; their purpose is to decorate the home during these holidays.

Classification of the imports under heading 9505 is also supported by the Chapter 70 Notes, which explicitly exclude items from Chapter 70 that are covered under Chapter 95. Chapter 70 Notes, 1(f), HTSUS.

When the globe and base are viewed as a unit, the most specific description per GRI 3(a) is as an ornament classifiable under heading 9505. The term "glassware" only describes a portion of the item, and its applicability does not prevent this Court from finding that another classification more specifically describes the subject imports when they are viewed as whole units.

The Court finds, therefore, that the Easter globes are properly classified as other festive articles under subheading 9505.90.60, HTSUS, and that the Christmas related water globes are properly classified as other Christmas ornaments under subheading 9505.10.25, HTSUS.

G. *Subheading 9505.10.50, HTSUS: Santa with Chimney Smoker, Fabric Mache Santa with Bag of Toys, Fabric Mache Scanda Klaus, Fabric Mache MacNicholas, Porcelain Santa with Light-up Tree:*

The subject imports are a Santa with chimney smoker,[4] and various fabric mache Santa Claus figures, some of which are portrayed in different cultural traditions.[5] The cultural Santa figures stand approximately one foot tall on wooden bases.

Customs classified the subject imports as other articles for Christmas festivities under 9505.10.50, HTSUS, and imposed a tariff of 5.8%. Plaintiff urges that the Santa with chimney smoker should be classified under subheading 9505.10.15, HTSUS, as Christmas ornaments made of wood, which carries a tariff of 5.1%, and the other imports should be

[4] This smoker is similar to the Santa with toys smoker addressed in Part II.A of this opinion, which Customs classified as a doll under subheading 9502.10.40, HTSUS, except that this smoker stands beside a chimney. This difference apparently influenced Customs to classify them differently.

[5] The fabric mache Santas are similar to the fabric mache Mrs. Claus addressed in Part II.A of this opinion, which Customs classified under subheading 9502.10.40, HTSUS, as a doll. Mrs. Claus differs from Santa only as to gender. Apparently, this compelled Customs to classify Mr. and Mrs. Claus differently. The Court notes that the gender of the import has no bearing on its proper classification. *See Hasbro Indus., Inc. v. United States*, 7 Fed. Cir. (T) 110, 879 F.2d 838 (1989) (affirming Customs classifying G.I. Joe as a "doll" within the common meaning of the TSUS).

classified as other Christmas ornaments under 9505.10.25, HTSUS, which carries a tariff of 5%.

Because Customs classified these items under a residual subheading, other articles for Christmas festivities, the first issue is whether the imports come within the scope of the term "ornament." This Court finds that they do. They adorn the house during Christmas. Their use, sale, and purpose are limited to the Christmas season.

Although the items can be classified as either Christmas ornaments, or as other articles for Christmas festivities, the Court finds that the more specific classification is Christmas ornaments because the term "ornament" is narrow and better describes the items in comparison to the residual classification. GRI 3(a), HTSUS. Plaintiff, therefore, satisfies its burden by showing that these items were erroneously classified by Customs. The Santa with chimney smoker is properly classified under subheading 9505.10.15, HTSUS, and the other imports at issue are properly classified under subheading 9505.10.25, HTSUS.

H. *Subheading 9505.10.40, HTSUS: Various Resin Figures:*

The subject imports consist of resin figures of Santa Claus or merrymakers in various poses: hooded Santa roly-poly, figures decorating a Christmas tree, Santa in a sleigh, Santa with tree, old fashion Santa figure, Santa with deer, and Santa sewing an American flag.

Customs classified these as other plastic articles for Christmas festivities under 9505.10.40, HTSUS, and imposed a tariff of 8.4%. Plaintiff urges that these should be classified as other Christmas ornaments under 9505.10.25, HTSUS, which carries a tariff of 5%.

Because Customs classified these items under a residual subheading, other articles for Christmas festivities, the first issue is whether the imports come within the scope of the term "ornament." This Court finds that they do. They adorn the house during Christmas. All of the samples presented at trial are representations of Santa Claus or other holiday figures. Evidence presented at trial showed that their use and time of sale are limited to the Christmas season.

Although the items can be classified as either Christmas ornaments, or as other plastic articles for Christmas festivities, the Court finds that the more specific classification is Christmas ornaments because the term "ornament" is narrow and better describes the items in comparison to the residual classification. GRI 3(a), HTSUS. Plaintiff, therefore, satisfies its burden by showing that these items were erroneously classified by Customs, and has demonstrated that subheading 9505.10.25, HTSUS, is the correct classification.

CONCLUSION

For the foregoing reasons, the Court rules in favor of the plaintiff in part, and in favor of the defendant in part. A separate judgment and order thereon will be entered accordingly.

(Slip Op. 96–20)

MERCK, SHARP & DOHME INTL., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89–01–00034

[Judgment for plaintiff.]

(Dated January 19, 1996)

Barnes, Richardson & Colburn (Sandra Liss Friedman, Alan Goggins, and *Frederic D. Van Arnam, Jr.),* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark S. Sochaczewsky);* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Sheryl A. French),* of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* This matter is before the Court following trial *de novo.* In this action, Merck, Sharp & Dohme International ("Merck") claims that the United States Customs Service ("Customs") improperly appraised Indocin SR ("Indocin"), a drug which Merck imported from an affiliated corporation in Holland. More specifically, Merck claims that Customs improperly appraised the value of an assist, indomethacin, which Merck produced and provided free of charge to its Holland affiliate. The Court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988), and upon review of the evidence presented at trial, the Court finds that Customs erred in appraising the indomethacin assist.

I. BACKGROUND

The merchandise at issue, Indocin, was manufactured in Holland by Merck, Sharp & Dohme BV, an affiliate of the plaintiff. The Holland affiliate manufactured the Indocin using two assists[1] that were provided free of charge by the plaintiff. One assist consisted of empty capsules which Merck purchased from an unrelated supplier. The second assist consisted of a drug component called indomethacin, which Merck manufactured.

When the Indocin entered the United States, Customs appraised the drug based on its transaction value pursuant to 19 U.S.C. § 1401a(b) (1988). Customs determined transaction value by adding the following: (1) the price Merck paid to the Holland affiliate for processing; (2) the value of the two assists, which was determined by using the figures that were declared on the invoice; and (3) the freight and handling charges associated with shipping the assists to Holland. (Compl. & Answer ¶ 5.) The only element of appraisement that Merck contests is Customs' appraisement of the indomethacin assist.

[1] An assist consists of, among other things, merchandise consumed in the production of the imported merchandise or materials incorporated in the imported merchandise when supplied by the buyer to the seller free of charge or at a reduced cost. 19 U.S.C. § 1401a(h)(1)(A) (1988).

II. DISCUSSION

It is undisputed that transaction value includes the value of an assist. 19 U.S.C. § 1401a(b)(1)(C) (1988). In addition, it is undisputed that when a buyer produces an assist, the basis for appraising the assist is cost of production. 19 C.F.R. § 152.103(d)(1) (1983). Merck claims that Customs erred because instead of appraising the indomethacin assist based upon its cost of production, Customs used the value declared on the invoice, which represented a transfer price. According to Merck, the transfer price is not the indomethacin's cost of production.[2] Rather, the cost of production can be found by examining the business records that Merck presented to the Court at trial. The defendant responds that Merck has failed to prove that its cost of production figures are accurate. As Customs' appraisement is presumed correct, the issue in this case is whether Merck has met its burden of proving by a preponderance of the evidence that its cost of production figures for the indomethacin assist are accurate. *See* 28 U.S.C. § 2639(a)(1) (1988).

A. *The Necessity of Source Documentation:*

The defendant does not dispute that the proper basis for appraising the indomethacin assist is cost of production. (Compl. & Answer ¶ 7.) However, the defendant claims that Customs' appraisement should be sustained because Merck cannot satisfy its burden of proving that its cost of production figures are accurate. The defendant claims that Merck cannot sustain its burden of proof in part because despite the fact that Merck has some documentation to support its cost of production figures, Merck cannot provide necessary source documentation to Customs or the Court.

The defendant supports its position with the trial testimony of Carole Jablonski, an auditor for Customs. Ms. Jablonski testified that in the course of her involvement with this case, she requested certain source documentation from Merck, which Merck failed to provide. More specifically, Ms. Jablonski testified that Merck failed to provide the following: (1) detailed cost records, including invoices and proof of payment supporting the indomethacin's standard costs; (2) detailed cost records, including payroll records supporting the standard labor costs; (3) detailed cost records including overhead pool and allocation base supporting the standard overhead costs; (4) invoices and proof of payment supporting the packing costs; (5) detailed explanation and supporting cost records for the "assay" and "cert" charges that appear on the bill of materials; and (6) details supporting the excluded charges. According to Ms. Jablonski, Merck's cost of production figures cannot be adequately verified without this source documentation.

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[2] A "transfer price" is an accounting term reflecting "the price charged by one segment (subunit, department, division, etc.) of an organization for a product or service supplied to another segment of the same organization." Charles T. Horngren & George Foster, *Cost Accounting* 835 (6th ed. 1987). At trial, Merck's witnesses were unable to determine how the transfer price in this instance was derived. However, they did explain how Merck generally derived a transfer price. The transfer price would be derived by starting with standard cost of production, and then adding a variety of additional costs; then this result would be multiplied by a gross number to yield the transfer price.

The Court does not agree with the defendant's contention that Merck's failure to produce this source documentation necessarily precludes Merck from proving by a preponderance of the evidence that its cost of production figures are accurate. The Court notes that Merck's standard practice is to retain the source documents that were requested for a period of seven years; after this period, the documents are destroyed. While the indomethacin at issue in this case was produced in 1981, 1982, and 1983, Customs failed to request source documentation from Merck until 1991 or 1992. Consequently, when Customs asked Merck to provide source documents, the documents no longer existed. In addition, the Court notes that Customs does not, as a matter of routine, require importers to produce source documentation in order to substantiate their cost of production figures. Hence, the facts in this case do not lead the Court to find that Merck has attempted to hide its documentation from Customs or the Court. Moreover, it is significant that while Merck lacks the particular source documentation requested by Customs, it does have other documentation that it wishes the Court to consider. *Compare with Andy Mohan, Inc. v. United States,* 74 Cust. Ct. 105, 396 F. Supp. 1280 (1975) (granting judgment in favor of defendant in light of destruction of documentary evidence, evidentiary deficiencies, ambiguities, and discrepancies in plaintiff's evidence), *aff'd,* 63 CCPA 104, 537 F.2d 516 (1976).

Customs' statutes and regulations do not require an importer to prove its case by submitting specific documentation. Consequently, the Court will not constrain Merck by requiring it to prove its cost of production figures in a rigid and proscribed way. *Cf. Aurea Jewelry Creations, Inc. v. United States,* 13 CIT 712, 714–15, 720 F. Supp. 189, 191 (1989) (stating that even in light of a documentation requirement for drawback recovery, "Customs may not establish such a strict standard of compliance as to make drawback recovery prohibitive"), *aff'd* 9 Fed Cir (T) 95, 932 F.2d 943 (1991). The Court does not find that the specified source documentation is essential for plaintiff to prove its case. Instead, Merck may prove that its cost of production figures are accurate by providing evidence that the Court deems satisfactory.

Of course, the Court must carefully scrutinize the evidence in support of Merck's cost of production. *Andy Mohan,* 74 Cust. Ct. at 112, 396 F. Supp. at 1286. Omissions and inconsistencies in Merck's proof have significance; they militate against Merck in its quest to satisfy its burden of proof. *See Id.* at 113, 396 F. Supp. at 128; *Murjani Int'l Ltd., v. United States,* 17 CIT 1035, 836 F. Supp. 883 (1993) (suggesting that inconsistencies in what a plaintiff claims is the proper value should be adequately explained). However, satisfactory proof is not required to be perfect. *Coats & Clark, Inc. v. United States,* 74 Cust. Ct. 13, 16, C.D. 4581 (1975). Consequently, the Court will examine Merck's evidence, and then defendant's objections to Merck's evidence, to evaluate whether Merck has proven by a preponderance of the evidence that its cost of production data is accurate.

B. *The Sufficiency of Evidence Presented by Merck:*

At trial, Merck presented the testimony of Thomas Eisenberger, the director of financial services for its manufacturing division. In order to determine the indomethacin's cost of production, Mr. Eisenberger examined Merck's business records. He determined that the standard cost of producing the indomethacin was $98.553 per kilogram for 1981, $122.263 per kilogram for 1982, and $157.834 per kilogram for 1983.

In support of this claim, Merck submitted the chemical division's cost master listings for the years 1981, 1982, and 1983. (Pl. Conf. Ex. 1.) The cost master listing is a report which contains the standard cost of producing the indomethacin during the years in question on a per-kilogram basis. In addition, Merck submitted the pharmaceutical division's cost masters, which also contain the indomethacin's cost of production from the perspective of the pharmaceutical division. (Pl. Conf. Ex. 2.) Both of these documents substantiate Mr. Eisenberger's testimony regarding the cost of producing the indomethacin. Merck also produced the journal entry, where the cost of the first shipment of indomethacin sent to Holland was recorded. (Pl. Conf. Ex. 3.) The amount of the journal entry correlates to the cost of production stated on the cost masters for 1981: when the amount stated in the journal entry is divided by the number of kilograms in the shipment, it equals the per-kilogram amount on the cost masters.

Defendant alleges that even if Merck is not necessarily precluded from satisfying its burden of proof because it lacks requested source documentation, Merck has failed to prove that its asserted cost of production figures for the indomethacin are accurate. Defendant argues that based on its analysis of the data submitted by Merck, Merck's cost of production figure is understated and that additional items should be included in cost of production. More specifically, defendant claims that the following items should be included: (1) two charges, "assay" and "cert," that appear on the pharmaceutical division's cost masters; (2) a packing charge that appears on the chemical division's cost master listings; and (3) a percentage of costs that Merck failed to include in its cost of production. The Court addresses these issues in turn.

1. *Assay and Cert Charges:*

The defendant claims that two charges, "assay" and "cert," should be added to cost of production because they are reported on the pharmaceutical division's cost masters. (Pl. Conf. Ex. 2.) According to the testimony of Ms. Jablonski, these charges should be added because the cost masters, which are also known as bills of materials, purport to list a company's cost of production. Based on the fact that the assay and cert charges are listed on the bills of materials, the defendant argues that without source documentation to the contrary, the Court should presume that these charges are components of cost of production. Upon review of the evidence, the Court is satisfied that these charges are not components of cost of production.

Merck's witness, Mr. Eisenberger, explained that the charges listed on the pharmaceutical division's cost masters do not exclusively represent costs of producing the indomethacin. Mr. Eisenberger explained that the chemical division was responsible for producing the indomethacin that went to Holland. In contrast, the pharmaceutical division was responsible for receiving the Indocin from the Holland affiliate after it was further processed and then bringing the drug to the market. Thus, the pharmaceutical division's cost master reports cost of production from its own perspective: while it includes the cost of producing the indomethacin, it also includes other costs, such as processing in Holland, the duty and freight charges incurred to bring the Indocin back from Holland, and quality control once the product arrived back in the United States.

Indeed, testimony presented at trial showed that the assay and cert charges listed on the pharmaceutical division's cost master should not be included as components of cost of production. Mr. Eisenberger testified that the assay charge represented costs incurred in Holland for foreign processing. He also testified that the cert charge represented the costs of freight and duty incurred to transfer the final product, Indocin, from Holland to the United States, and some costs for quality inspection, after it arrived. This testimony convinces the Court that these charges are not dutiable as costs of producing the indomethacin.

The government further argues that Merck's claim that the assay charge represents the costs of foreign processing is contradicted because the invoice value for foreign processing indicates a different value. The Court does not agree. Items located on the bill of materials represent *costs* and include the cost incurred for foreign processing. The invoice value, on the other hand, does not necessarily represent costs. Rather, the invoice value for foreign processing in this case reflected an amount that Merck was *billed and paid* to the Holland affiliate for processing the Indocin. Mr. Eisenberger testified that the invoice value was higher than the cost because profit was added into the invoice value.

2. *Packing Charges:*

The defendant claims that charges representing packing costs that appear on the chemical division's cost master listings should be added to the indomethacin's cost of production. (Pl. Conf. Ex. 1.) The defendant argues that because these charges are listed separately on the cost master listings from the indomethacin's cost of production, these costs were not included in cost of production. Merck responds that although the packing costs appear on its cost master listings, and represent additional costs, they were not actually incurred with respect to the indomethacin at issue.

In support of Merck's contention, Mr. Eisenberger testified that the indomethacin's cost of production included the cost incurred for packing the indomethacin into the standard configuration, which was a 25 kilogram drum. Mr. Eisenberger explained that the packing costs on the cost master listings represented additional costs incurred whenever a

configuration other than the standard was used: additional charges would be incurred when a configuration other than the standard was used because extra packaging and handling were required. At trial, however, Merck submitted records confirming that the shipment at issue was packed in the standard configuration. (Pl. Ex. 5.) This evidence convinces the Court that the packing charges that appear on the cost master listings were not incurred in transporting the indomethacin at issue to Holland. Consequently, the Court finds that the packing charges that appear on the cost master listing should not be included in the cost of producing the indomethacin.[3]

3. *Excluded Period Costs:*

The defendant also claims that certain costs that were excluded from Merck's asserted cost of production should probably be included in the cost of production. The defendant argues that without the ability to audit Merck's books, it is impossible to verify the nature of these costs, and to determine whether they must be considered components of cost of production. Upon consideration of the evidence, the Court is satisfied that Merck's method of deriving its cost of production accurately captures all costs that are required.

Merck's witness, Lloyd Woods, testified regarding the expenses that were included and excluded from cost of production during the years in question. (Pl. Ex. 6.) Generally, the cost of production included expenses that bore a clear relationship to the production process, while it excluded expenses that were further removed from the production process. The cost of production included the cost of raw materials, direct labor hours, and an allocation of overhead. Overhead, in this context, is defined as "all other expenses directly related to production but not assigned to a specific physical unit of product." *Id.* Examples of overhead include steam, utilities, maintenance, waste treatment, quality control testing, supplies, supervisory salaries, and employee benefits.

Costs that Merck excluded from cost of production were recorded as period costs. These excluded costs basically consisted of general and administrative costs that are further removed from the production process, such as the salaries of corporate executives, and the maintenance and utility expenses associated with corporate offices.[4] The rational behind Merck's exclusion of these items was that although the corporate executives may have a fiduciary responsibility regarding the production of the indomethacin, they are not clearly involved with the production process.

Mr. Woods testified that Merck's method of allocating costs to cost of production is the same as that used throughout the chemical industry

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[3] At trial, Merck raised an alternative argument which would also prevent additional packing costs from being added in this case: Merck claimed that packing costs (even when incurred) are not dutiable to the cost of an assist. (*See* Tr. at 101–04, 171–75.) However, the Court has found that the additional packing costs on Merck's cost master listing were not incurred in this case. In addition, although Merck acknowledges that its asserted cost of production included packing costs, Merck does not argue that it is entitled to a reduction in cost of production. Consequently, the Court finds it unnecessary to address whether packing costs may be dutiable to the cost of an assist.

[4] The Court notes that one of the costs that Merck excluded was the variance, if any, resulting from the difference between standard and actual costs. The Court discusses this exclusion in Part C of its opinion.

and most other industries. Mr. Woods also testified that Merck's method of determining cost of production is consistent with generally accepted accounting principles ("GAAP"). More specifically, *AICPA Accounting Research Bulletin No. 43,* which is a source of GAAP, supports Merck's method of determining which costs are included in cost of production, i.e. general and administrative costs not clearly related to production are excluded and carried as period costs.

Upon review, the Court accepts Merck's method of determining cost of production. Merck presented detailed testimony at trial proving how it allocated costs to cost of production. Merck also provided ample evidence to show that its method of determining cost of production is the predominant method used throughout the industry, and is in accordance with GAAP. In contrast, the defendant failed to present any evidence, either directly or through cross-examination of Merck's witnesses, showing that the costs that Merck excluded were clearly production related. Moreover, the defendant failed to present to the Court a workable alternative for determining cost of production. Consequently, the Court accepts Merck's method of allocating costs to cost of production.[5]

C. *Merck's Exclusion of Variances from Cost of Production:*

The government also claims that Merck's cost of production is inadequate because it fails to include the variances representing the difference between standard and actual costs. The Court disagrees and finds Merck's use of standard costs adequate.

Merck's cost of production figures are standard, in contrast to actual costs. The standard cost of production was computed in advance of the actual production process. It was a prediction of actual costs to be incurred based upon negotiated contracts for raw materials and other indicators. Merck's practice was to exclude the variance representing the difference between standard and actual costs from its calculation of cost of production, except when the variance was unusually large. Mr. Woods, a witness for Merck, testified that Merck routinely compared the actual costs to the standard costs. Because of the careful process Merck used to determine the standard cost of production, the variances were virtually always very small. The variances for the years in question were: 2% for 1981, 0% for 1982, and –3% for 1983. Hence, the evidence

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[5] Merck urges the Court to hold that when proposed cost of production information is consistent with GAAP, as it is in this case, then Customs lacks authority to reject it. In other words, Merck argues that all cost of production information that is consistent with GAAP *must* be accepted for appraisement purposes. Merck relies on 19 U.S.C. 1401a(g)(3) (1988), which states in pertinent part:

> Information that is submitted by an importer, buyer, or producer in regard to the appraisement of merchandise may not be rejected by the customs officer concerned on the basis of the accounting method by which that information was prepared, if the preparation was in accordance with [GAAP].

In addition, Merck relies on legislative history, which states: "for purposes of determining the proper value to be added for an assist, the information available in the buyer's commercial record system would be used to the greatest extent possible." S. Rep. No. 249, 96th Cong. 1st Sess. 120 (1979). The Court does not agree with Merck's reading of § 1401a(g)(3). If the provision was intended to have the sweeping effect that Merck suggests, then the statute would have been written to carry out that position in much clearer terms. In addition, while such a reading may be attractive in a case such as this where the statutes and regulations do not give guidance on how to determine cost of production, GAAP, as a general matter, is only an accounting method, and does not speak to whether a item may be dutiable for Customs purposes. Thus, the Court declines to hold that adherence to GAAP is dispositive for determining the appraisement of an assist.

showed that Merck's standard cost for the indomethacin was very close to actual costs during the years at issue.

The fact that a company records standard costs does not make its records inadequate or unusable from an appraisal standpoint. In this case, because Merck kept track of the actual costs, and compared the figure to the standard costs, it is able to determine that the variances for the years in question were small. Merck also has been producing indomethacin for many years, and the variance has always been very small. Because the Court is satisfied that the variances for the years in question were negligible, the Court finds Merck's use of standard costs to be acceptable. In addition, the Court notes that in other contexts, Customs' policy is to accept standard cost accounting systems, when such systems meet certain criteria, all of which were satisfied here.[6]

CONCLUSION

Upon review, the Court finds that the testimony of Merck's witnesses, and the documentary evidence presented by Merck, are sufficient to prove Merck's cost of production. The objections that defendant has raised to Merck's evidence do not persuade the Court that Merck's cost of production figures for the indomethacin are inaccurate. Accordingly, Merck has rebutted the presumption of correctness in favor of Customs' appraisement of the indomethacin.

Further, the Court finds that Customs erred by using the value declared on the invoice, or transfer price, to appraise the indomethacin. Customs' regulations mandate that when a buyer produces an assist, the basis for appraising the assist is cost of production. 19 C.F.R. § 152.103(d)(1) (1983). Customs should not have appraised the indomethacin assist using the transfer price because the evidence fails to show that the transfer price represented the cost of production. Indeed, transfer prices may be cost based, market based, or based on negotiated prices, and there is "no requirement that the chosen transfer price have any specific relationship to either cost or market price data." Charles T. Horngren & George Foster, *Cost Accounting:* 836 (6th ed. 1987). Customs only used transfer price in this case because it believed Merck's cost of production information was inadequate. However, in light of the Court's finding that Merck's proof of its cost of production is adequate, the Customs' use of the transfer price is unjustified and will not be sustained. Judgment will be entered in favor of plaintiff.

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[6] Customs' policy is illustrated by Customs Ruling No. HQ 400231 (Oct. 5, 1976), which states:

> In summary, we conclude that a standard cost system, supported by an adequate compliance system and constituted in accordance with [GAAP], which is based upon actual experience, which takes into consideration all expenses actually incurred and properly a part of constructed value, which provides for regular revision of the standard to accommodate variances in costs, and which is able to recognize and adjust for unacceptable variances in costs as they occur, will, for Customs purposes, provide acceptable cost data for determining dutiable value.

(Slip Op. 96–21)

MIAMI FREE ZONE CORP., PLAINTIFF *v.* FOREIGN-TRADE ZONES BOARD, DEPARTMENT OF COMMERCE, AND UNITED STATES, DEFENDANTS, AND WYNWOOD COMMUNITY ECONOMIC DEVELOPMENT CORP., INC., AND DADE FOREIGN TRADE ZONE, INC., DEFENDANT-INTERVENORS

Court No. 93–06–00324

Plaintiff challenges the Foreign-Trade Zones Board's grant to defendant-intervenor Wynwood Community Economic Development Corporation, Inc. to establish, operate, and maintain a general-purpose foreign trade zone. *See Application of Wynwood Community Economic Dev. Corp.*, 56 Fed. Reg. 61,227 (Dep't Comm. 1991) (resolution and order).

Held: Plaintiff was not deprived of due process. Plaintiff's request for a remand to the Foreign-Trade Zones Board for an evidentiary hearing is denied. The Court cannot discern, however, whether the Board followed its statutory mandate in approving Wynwood's application. Accordingly, the Board's grant is remanded so that it may explain fully its basis for approving the Wynwood application and point out what evidence on the record it relied upon in reaching that determination.

(Date January 19, 1996)

Sandler, Travis & Rosenberg, P.A. (Gilbert Lee Sandler, Edward M. Joffe, Arthur K. Purcell), for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert, Carla Garcia-Benitez); Robert J. Heilferty*, Attorney-Advisor, Office of the General Counsel, United States Department of Commerce, of Counsel, for defendants.

Hogan & Hartson L.L.P. (Lewis E. Leibowitz, David G. Leitch, Timothy C. Stanceu, Joanne L. Leasure), for defendant-intervenors.

OPINION

CARMAN, *Judge:* Plaintiff challenges the United States Foreign-Trade Zones Board's (FTZB or Board) grant of authority to defendant-intervenor, Wynwood Community Economic Development Corporation, Inc. (Wynwood) to establish, operate, and maintain a general-purpose foreign-trade zone (FTZ) in Miami, Florida, within the Miami Customs port of entry. Defendants the Foreign-Trade Zones Board, the Department of Commerce, and the United States (collectively "defendant") and defendant-intervenors urge this Court to deny plaintiff's motion.[1] The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i)(1), (4) (1988).

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[1] Plaintiff titles and styles its motion as a motion for summary judgment pursuant to U.S. CIT R. 56. Defendant-Intervenors argue that because plaintiff's motion relies solely on the agency record before the Board, plaintiff should have filed its motion pursuant to U.S. CIT R. 56.1 *(See* Def.-Intervenors' Cross-Mot. for Summ J. at 1.) Because Rule 56 does not provide that the Court may grant summary judgment in favor of a non-movant, defendant-intervenors reason, defendant-intervenors filed a cross-motion for summary judgment to protect their interests. *See id.* at 2.) Defendant also filed a cross-motion stating "[t]he interests of justice warrant acceptance of this cross-motion or treating our papers as a response under Rule 56.1 should plaintiff's motion be deemed to have been filed under that Rule." (Federal Defs.' Cross-Mot. for Summ. J. at 2 n.*.)

Section 706 of title 5 requires the Court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706 (1994). Accordingly, the Court will treat plaintiff's motion as a motion for judgment upon the agency record pursuant to Rule 56.1. Defendant's cross-motion and reply, *(see generally* Fed. Defs.' Reply Br. in Supp. of Mot. for Summ. J. & in Opp'n to Pl.'s Resp.), will be treated as a single response in opposition to plaintiff's motion for judgment upon the agency record. Finally, because defendant-intervenors state in their submission to this Court entitled "CROSS-MOTION FOR SUMMARY JUDGMENT" that "defendant-intervenors are compelled to file this motion so that judgment may be entered in their favor in the event that the Court determines they are so entitled," (Def.-Intervenors' Cross-Mot. for Summ. J. at 2), and that defendant-intervenors "rely on their opposition to plaintiff's motion

continued

BACKGROUND

Plaintiff Miami Free Zone Corporation operates one of two general-purpose FTZs in the Miami Customs port of entry area.[2] Defendant-Intervenor Wynwood is a Florida non-profit corporation.[3] On October 17, 1990, Wynwood filed an application with the Board requesting authority to establish a third general-purpose FTZ within the Miami Customs port of entry at a proposed site donated by the City of Miami for development of an FTZ. *See Notice of Application,* 55 Fed. Reg. at 43,152. Wynwood contended "the additional zone is needed to provide zone services to the Wynwood area of the Miami port of entry as part of the economic development efforts underway in that community." *Id.* On December 14, 1990, plaintiff filed an objection to Wynwood's application and requested the Board hold evidentiary hearings on the application. No hearing was held. On November 18, 1991, the Board, "finding the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations * * * satisfied, and that the proposal [was] in the public interest," approved Wynwood's application. *Application of Wynwood Community Economic Dev. Corp.,* 56 Fed. Reg. 61,227 (Dep't Comm. 1991) (resolution and order) *(Wynwood Grant).*[4]

Defendant-Intervenor Dade Foreign Trade Zone, Incorporated (Dade) informs this Court that it is a Florida corporation organized for the purpose of developing and operating the Wynwood FTZ. After the Board granted FTZ No. 180, defendant-intervenors explain, Wynwood entered into a lease agreement with Dade.[5] The terms of the lease provide that Dade shall construct appropriate facilities within the zone and may sublease those facilities. Dade would pay a monthly rent for the zone, but, according to defendant-intervenors, could retain any profits from the zone's operations.

CONTENTIONS OF THE PARTIES

A. *Plaintiff:*

Plaintiff requests this Court vacate the Board's grant of authority to Wynwood to establish, operate, and maintain FTZ No. 180, and remand

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as support for [the] cross-motion," *(id.* at 3), the Court construes defendant-intervenors' "CROSS-MOTION FOR SUMMARY JUDGMENT" as part of defendant-intervenors' response in opposition to plaintiff's motion for judgment upon the agency record. Similarly, plaintiff responded to defendant-intervenors' "CROSS-MOTION FOR SUMMARY JUDGMENT" by stating "plaintiff is not able at this time to respond to the cross motion for summary judgment." (Pl.'s Resp. to Cross-Mot. for Summ. J. of Def.-Intervenors at 1.) Accordingly, the Court will treat plaintiff's submission entitled "MIAMI FREE ZONE CORPORATION'S RESPONSE TO CROSS MOTION FOR SUMMARY JUDGMENT OF DEFENDANT-INTERVENORS, WYNWOOD COMMUNITY ECONOMIC ZONE, INC. AND DADE FOREIGN TRADE ZONE, INC." as nothing more than docketed correspondence to this Court and not as a response to a motion. For citations purposes, however, the Court will refer to parties' submissions as titled by the parties when filed.

[2] Plaintiff operates FTZ No. 32, which was approved in 1977. *See Proposed Foreign-Trade Zone—Miami, FL,* 55 Fed. Reg. 43,152 (Dep't Comm. 1990) (notice of application filing) *(Notice of Application).* The second FTZ project existing at the time of Wynwood's application, FTZ No. 166, was approved in 1990 but not activated. *See id;* (Fed. Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. & in Supp. of Fed. Defs.' Cross-Mot. for Summ. J. (Fed. Defs.' Opp'n) at 7–8 (citing Public Record (P.R.) 105 at 4).)

[3] Wynwood characterizes itself as "a Florida non-profit corporation devoted to improving the economic, educational, and social standards of the Wynwood neighborhood of Miami, a socially and economically depressed area of Dade County adjacent to the city's downtown." (Def.-Intervenors' Opp'n to Pl.'s Mot. for Summ. J. (Def.-Intervenors' Opp'n) at 4.)

[4] The Court will refer to this FTZ as the Wynwood FTZ or, as designated by the Board, FTZ No. 180.

[5] In its opposition to Wynwood and Dade's motion to intervene, plaintiff complained Dade's "lease has never been approved by the City, a prerequisite to any lease holder." (Pl.'s Opp'n to Mot. to Intervene at 1; *see also id.* at 3.) The Court makes no finding on this issue.

this matter to the Board for an evidentiary hearing. In so doing, plaintiff advances three primary contentions. First, plaintiff contends it was entitled to a hearing to contest the Wynwood application because plaintiff possesses a constitutionally recognized property interest in FTZ No. 32 within the meaning of the Fifth Amendment's Due Process Clause. "[A]ny deprivation of [plaintiff's] property," plaintiff argues, "must be preceded by a due process right to be heard." (Br. in Supp. of Pl.'s Mot. for Summ. J. (Pl.'s Br.) at 7 (citations omitted).) Citing the United States Supreme Court's enunciation in *Zinermon v. Burch*, 494 U.S. 113 (1990), of factors considered to determine procedural protection the Constitution requires,[6] plaintiff argues those factors require a hearing be provided in the instant case. Specifically, plaintiff maintains its interest is clearly affected in that the Foreign-Trade Zones Act (FTZA) creates a monopoly in the applicable port and allows the monopoly to continue if the grantee continues to serve the convenience of commerce. "The Board itself," plaintiff reasons, "acknowledged that the approval of an additional zone would have an anti-competitive effect on Miami Free Zone." (Pl.'s Br. at 8–9 (citation omitted).) Furthermore, plaintiff claims, the Board's procedures in this case "were materially deficient, thereby creating a risk of error." *(Id.* at 9.)[7] Finally, plaintiff argues that holding a hearing would not impose an increased burden on the government.

Plaintiff's second primary contention is that the Board misinterpreted the FTZA's statutory prerequisites for the grant of an additional zone in the same port of entry. Plaintiff points to § 81b of the FTZA which states in pertinent part: "Zones in addition to those to which a port of entry is entitled shall be authorized only if the Board finds that existing or authorized zones will not adequately serve the convenience of commerce." 19 U.S.C. § 81b(b) (1988). Plaintiff argues "commerce" as used in the FTZA means "foreign-trade." (Pl.'s Br. at 12.) Plaintiff maintains that in the present case, however, the Board incorrectly "equated 'convenience of commerce' with revitalization and economic development of the Wynwood area, *i.e.*, elimination of urban blight." *(Id.* at 10.) According to plaintiff, "[t]he Board looked to whether the public inter-

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[6] The language plaintiff cites is, in part, as follows:

> To determine what procedural protections the Constitution requires in a particular case, we weigh several factors:
>
> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."
>
> Applying this test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property.

Zinermon, 494 U.S. at 127 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (further citation omitted)) (further citations omitted), *quoted in* Pl.'s Br. at 8.

[7] Plaintiff argues the Board's procedures were deficient first because the Board "merely allowed a short comment period," a "particularly grievous" failure in light of plaintiff's explicit request for a hearing. (Pl.'s Br. at 9.) Second, plaintiff claims that

> [a]fter the close of the comment period, Wynwood wrote the Board at least four * * * letters about [plaintiff's] objection. At the time [plaintiff] did not receive copies of these communications, and consequently, was unable to respond. The Board's decision appears to be primarily based upon those *ex parte* communications after the close of the comment period * * *. Accordingly, [plaintiff] was prejudiced by its inability to controvert these *ex parte* comments to the Board.

(Id. (citations omitted).)

est would be better served by the establishment of the additional zone notwithstanding the possible competition on [plaintiff]." *(Id.* at 11.) These "tests," plaintiff continues, "were based on social welfare/public interest factors which cannot be equated with whether [plaintiff] was adequately meeting the convenience of commerce *i.e.,* Foreign-Trade." *(Id.* at 12.)[8]

Finally, plaintiff contends the Board should have given plaintiff "a right of first refusal to operate Wynwood as a non-contiguous zone or a subzone." *(Id.* at 14.) According to plaintiff, as early as March 1989, plaintiff was "ready, willing and able to operate in the Wynwood area." *(Id.)* Consequently, plaintiff argues, defendant is precluded from arguing "that the existence of the special benefits created by public sector at Wynwood permits a finding that the Miami Free Zone can not serve the convenience of the commerce." *(Id.* at 15.)

B. *Defendant:*

Defendant sets forth two primary contentions in support of the Board's determination. First, defendant contends plaintiff has failed to demonstrate how approval of the Wynwood application amounts to a denial of a property right as to plaintiff. According to defendant, the United States Court of Appeals for the Federal Circuit requires "[t]hose seeking constitutional protection under the due process clause [to] point to a legitimate claim of entitlement prior to any consideration of the Government's constitutional obligations." (Fed. Defs.' Opp'n at 14–15 (quoting *American Ass'n of Exporters & Importers—Textile and Apparel Group v. United States,* 3 Fed. Cir. (T) 58, 71, 751 F.2d 1239, 1250 (1985) (internal quotations and further citation omitted)).) Defendant maintains that in the present case, Greater Miami Foreign Trade Zone, Incorporated (Greater Miami), and not plaintiff, is the grantee—the recipient of the grant of authority from the Board. Under the FTZA, defendant points out, Greater Miami's "grant shall not be sold, conveyed, transferred, set over, or assigned." 19 U.S.C. § 81q (1988). Thus, defendant concludes, "the interests of a private operator are not among those interests sought to be protected by the [FTZA]." (Fed. Defs.' Opp'n at 15 (footnote and citation omitted).)

Furthermore, defendant maintains, even if plaintiff was able to establish it possesses a constitutionally protected property right based on its role as the zone grantee's private operator, plaintiff has not shown any such right has been denied. Defendant argues the very case upon which plaintiff relies indicates "due process only becomes relevant * * * where licenses are revoked." *(Id.* at 16 (emphasis added in brief omitted) (quoting *Wells Fargo Armored Serv. Corp. v. Georgia Public Serv. Comm'n,* 547 F.2d 938, 941 (5th Cir. 1977) (further citation omitted)).) Defendant

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[8] "The plain meaning of convenience of commerce," plaintiff continues,

> is consistent with the congressional intent to operate a harmonious FTZ Program with each individual zone servicing needs within a port without any overlap or duplication of service between the zones. Additional zones are prohibited unless a specific *finding* is made that the existing zone will not adequately serve the convenience of commerce. The Board, however, chose to ignore this test in authorizing the Wynwood foreign-trade zone.

(Pl.'s Br. at 12.)

argues that in the present case, however, no grant of authority has been revoked, "nor does the Board's decision implicate [plaintiff's] role as the exclusive operator of FTZ #32." *(Id.)*[9] "Simply put," defendant summarizes, plaintiff

> has not demonstrated that the [FTZA] provides it with a protectable property right to be free from any and all competition * * *.
> * * * [N]othing in the [FTZA] evidences any intention to protect a general-purpose zone operator's parochial interest by providing it with an unassailable monopoly over zone operations in a particular Customs port of entry. Congress may have intended to promote employment through increased trade; it did not intend, however, to provide plaintiff with an absolute monopoly over the facilitation of that trade.

(Id. at 17.)

As additional support for its argument rejecting plaintiff's claimed deprivation of a constitutionally protected property right, defendant argues plaintiff did have a meaningful opportunity to be heard, and that no formal hearing was required. Defendant asserts that neither the FTZA nor applicable regulations require a formal hearing.[10] Furthermore, defendant argues, the lack of a formal hearing in this case

> in no way impeded [plaintiff's] ability to comment on or refute evidence * * *. Plaintiff fully availed itself of the opportunity to comment which was provided by the Board. These comments—all but one of which were submitted after closure of the announced comment period—were placed on the public official record and were fully considered in the Board's deliberations.

(Id. at 18–19 (citations omitted).) In response to plaintiff's contention that the Board engaged in *ex parte* communications with Wynwood, defendant asserts plaintiff "fails to mention * * * that it, too, provided at least four additional * * * submissions for the record." *(Id.* at 20 (citations omitted).) Furthermore, defendant argues, communications received from Wynwood after close of the comment period were a matter of public record. "Consistent with its practice of accepting all comments which may be relevant to the outcome of the case, the Board continued to notify interested parties that additional comments would be given full consideration." *(Id.* (citation omitted).)

As its second primary contention, defendant contends the Board correctly applied the statutory criteria in approving the Wynwood application. Defendant explains the Board has interpreted the FTZA's requirement that "[z]ones in addition to those to which a port of entry is entitled shall be authorized only if the Board finds that existing or authorized zones will not adequately serve the convenience of com-

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[9] Defendant asserts that plaintiff's "position as operator of FTZ #32 results from a private contractual relationship with the grantee which is not relevant to the due process analysis." (Fed. Defs.' Opp'n at 16 n.6.)

[10] Defendant explains:

> The Board's practice is to hold hearings on general-purpose zone applications when available resources permit. In cases where no hearing is held, the public *Federal Register* notice and comment period provide a comparable degree of due process and opportunity to be heard.

(Fed. Defs.' Opp'n at 18 n.8.)

merce"[11] as "requiring a review that considers whether the additional zone will serve the 'public interest.'" *(Id.* at 22.)[12] In the case of the Wynwood application, defendant argues the Board properly considered whether "zone needs of the local community were satisfied by existing zone facilities." *(Id.* at 26.) In so doing, defendant continues, the Board made the following findings: (1) existing zones were not serving the convenience of commerce; (2) local business community expressed a need for additional zone services; (3) local officials' representations indicated the zone operated by plaintiff could not adequately serve the convenience of commerce; (4) the contractual relationship between the grantee of FTZ No. 32, Greater Miami, and plaintiff prohibited Wynwood from operating under the FTZ No. 32 license; and (5) the Miami port of entry contained a high level of international trade-related activity in the Miami port of entry.[13]

According to defendant, the Board's injection of a public interest analysis into "convenience of commerce" effectuates the purposes of the FTZA. Defendant argues that although the central purpose of the FTZA is to "'expedite and encourage foreign commerce,'" *(id.* at 27 (quoting S. Rep. No. 1107, 81st Cong., 2d Sess. (1949), *reprinted in* 1950 U.S. Code Cong. Serv. 2533, 2533–34)), the FTZA "was intended to expedite and encourage foreign commerce as a means toward increasing domestic employment," *(id.* (citing S. Rep. No. 905, 73d Cong., 2d Sess. 2, 3 (1934)).[14] Thus, defendant concludes, the Board's public interest consideration, "with consideration of local economic effects, including the economic development factors reviewed in this case—is fully consistent with the purposes of the [FTZA]." *(Id.)*

C. *Defendant-Intervenors:*

In support of the Board's grant, defendant-intervenors first contend the Board's proceedings complied with any due process requirements. According to defendant-intervenors, the Board's decision did not deprive plaintiff of any property interest because the Board did not revoke or restrict the grant of authority for FTZ No. 32, but instead merely authorized a competing licensee to do business. Defendant-Intervenors argue plaintiff has not offered any evidence that the value of its interest in the grant of authority for FTZ No. 32 has diminished, or that it has suffered any other tangible harm from the Board's approval of the Wynwood application. Plaintiff's argument that a zone grant includes a right to be free from competition, defendant-intervenors

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[11] 19 U.S.C. § 81b(b).

[12] Defendant further explains that over one year prior to its examination of the Wynwood application, the Board had issued a proposed regulation that would codify its position. (Fed. Defs.' Opp'n at 22 (citing *Foreign-Trade Zones in the United States*, 55 Fed. Reg. at 2760 (Jan. 26, 1990)).)

[13] Defendant maintains the Board also made several findings directly addressing plaintiff's submitted evidence attempting to show that approval of Wynwood's application would cause competitive harm to FTZ No. 32. According to defendant, these findings included: (1) the focus of the Wynwood FTZ would differ from that of FTZ No. 32; (2) the difference in focus would minimize any competitive impact on FTZ No. 32; (3) any incidental competitive effects would be outweighed by overriding public interest.

[14] The FTZA, defendant further asserts, "authorizes the Board to 'respond to and resolve the changing needs of domestic and foreign commerce through the trade zone concept.'" (Defs.' Opp'n at 27 (emphasis added in brief omitted) (quoting *Armco Steel Corp. v. Stans*, 431 F.2d 779, 788 (2nd Cir. 1970)).)

maintain, is contrary to the FTZA, which explicitly provides for the establishment of more than one zone in a single port of entry. (Def.-Intervenors' Opp'n at 14 (citing 19 U.S.C. § 81b(b).) Furthermore, defendant-intervenors argue, even if plaintiff could establish deprivation of a constitutionally protected property interest, "there is simply no basis in constitutional law for its claim that the Board was required to convene a formal evidentiary hearing." *(Id.* at 16 (footnote omitted).) Defendant-Intervenors assert that any due process requirements were "more than satisfied" when all interested parties, including plaintiff, were given the chance to submit their views to the Board and to respond to opposing views. *(Id.* at 17.) Additionally, defendant-intervenors argue, plaintiff's intimations concerning an inability to respond to alleged *ex parte* communications from Wynwood to the Board is flatly contradicted by the record because plaintiff's own letters submitted after the close of the comment period expressly referred and responded to the alleged *ex parte* communications by Wynwood.

Second, defendant-intervenors contend the Board correctly applied the "convenience of commerce" standard demanded by the FTZA. According to defendant-intervenors, the Board's interpretation of the statutory standard is a reasonable exercise of the discretion afforded to the Board as the agency charged with administering the FTZA. Additionally, defendant-intervenors argue, the Board's interpretation is consistent with both the text and purpose of the FTZA. "If Congress had intended the Board to consider only the needs of foreign trade in authorizing additional zones," defendant-intervenors assert, "it would have used those words." *(Id.* at 26.) Defendant-Intervenors argue the Board's interpretation of the FTZA's standard for the grant of an additional zone "to include consideration of the potential economic benefits of a zone proposal to the surrounding community," *(id.* at 25), "coincides with the overriding purpose of the [FTZA]: increasing foreign commerce in U.S. ports of entry to stimulate local economic development," *(id.* at 26). Furthermore, defendant-intervenors argue, even if plaintiff were correct in arguing that the needs of foreign commerce are the only reasonable considerations under the statutory standard, the Board's decision would still be proper because the Board expressly determined, based on record evidence, that the Wynwood FTZ was necessary to meet the needs of foreign trade.

Finally, defendant-intervenors contend that contrary to plaintiff's assertion, plaintiff was not entitled to a right of first refusal to operate the Wynwood FTZ. According to defendant-intervenors, plaintiff's dispute is actually with the City of Miami, which chose to pursue the Wynwood proposal over plaintiff's proposal to create a subzone or non-contiguous subzone in the Wynwood area. The Board was powerless to consider a subzone as an alternative to Wynwood's application, defendant-intervenors argue, because no application was before it.

STANDARD OF REVIEW

This Court set forth the standard of review applicable to decisions of the Board in *Conoco, Inc. v. United States*, 18 CIT ____, ____, 855 F. Supp. 1306, 1310–11 (1994) *(Conoco III)*. *See also Conoco, Inc. v. United States*, 19 CIT ____, ____, 885 F. Supp. 257, 262 (1995) *(Conoco IV)* (reiterating the standard of review set forth in *(Conoco III), appeal docketed*, No. 95–1390 (Fed. Cir. June 9, 1995); *Phibro Energy, Inc. v. Brown*, 19 CIT ____, ____, 886 F. Supp. 863, 868 (1995) (same). Based on the standards prescribed by 5 U.S.C. § 706, this "Court must first 'decide whether the [Board] acted within the scope of [its] authority' in order to determine whether the Board's action violated § 706(2)(C)." *Conoco III*, 18 CIT at ____, 855 F. Supp. at 1311 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (further citation omitted)) (bracketed text inserted in *Conoco III*). If this Court determines the Board did act within the scope of its authority, "the Court may then consider whether the Board's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' in violation of § 706(2)(A)." *Id.* at ____, 855 F. Supp. at 1311 (quoting 5 U.S.C. § 706(2)(A) (1988) and citing *Citizens to Preserve Overton Park*, 401 U.S. at 416).

DISCUSSION

A. *The Absence of a Hearing:*

The Court finds no merit in plaintiff's argument that it is entitled to a hearing due to a constitutionally protected property interest in FTZ No. 32. Even if plaintiff does possess a constitutionally protected property interest in FTZ No. 32,[15] simply because plaintiff requested a hearing does not mean that anything short of a hearing deprived plaintiff of due process. The Board afforded plaintiff sufficient notice and opportunity to be heard. On October 26, 1990, the Board published notice of the submission of the application. *See Notice of Application*, 55 Fed. Reg. at 43,152. That notice invited written comments from interested parties. *See id.* ("Comments concerning the proposed zone are invited in writing from interested parties."). Plaintiffs had several weeks in which to submit comments. *See id.* (setting the deadline for comments as December 14, 1990). On the last day of the comment period, plaintiff filed a written objection to Wynwood's application, thereby availing itself of that opportunity to be heard. At the same time, plaintiff also requested a hearing. Although the Board is authorized to hold hearings, the regulations do not require the Board to hold a hearing upon request. *See* 15 C.F.R. §§ 400.1305, 400.1309, 400.1315 (1990). If plaintiff wished to submit a greater amount of evidence, it could have done so in its objection filed December 14, 1990.

Plaintiff's claim that the Board's procedures in this case were materially deficient and thus call for a remand for an evidentiary hearing does

[15] The Court expressly does not hold that plaintiff possesses a constitutionally protected property interest in FTZ No. 32.

not alter the Court's analysis. In its papers before this Court, plaintiff alleges Wynwood provided comments to the Board after the close of the comment period. Plaintiff, however, also submitted post-comment period comments. *(See* P.R. 67 at 1 (Letter from German Leiva, President, Miami Free Zone Corp., to John J. DaPonte, Jr., Executive Secy., FTZB (Feb. 8, 1991) (requesting "that this comment be accepted late and considered as a part of the record during your deliberations on the * * * application")); P.R. 103 at 1 (Letter from German Leiva, President, Miami Free Zone Corp., to John J. DaPonte, Jr., Executive Secy., FTZB (Aug. 8, 1991) ("This letter will supplement our previous correspondence objecting to the foreign-trade zone application filed by [Wynwood].")).) If plaintiff was submitting post-comment period comments, it should have been aware that Wynwood was able to make similar submissions,[16] and should not now complain that Wynwood availed itself of the same opportunity. Furthermore, Wynwood's post-comment submissions to which plaintiff cites were made part of the administrative record. *(See* Pl.'s Br. at 9 (citing P.R. 66, 83, 97, 99).) Although plaintiff complains it "did not receive copies of these communications," presumably these communications were available to plaintiff upon request. In light of the above analysis, plaintiff's request for a remand for the purpose of holding an evidentiary hearing is denied.

B. *The Approval of the Wynwood Application:*

Section 81b(b) of the FTZA provides:

> Each port of entry shall be entitled to at least one zone, but when a port of entry is located within the confines of more than one State such port of entry shall be entitled to a zone in each of such States, and when two cities separated by water are embraced in one port of entry, a zone may be authorized in each of said cities or in territory adjacent thereto. *Zones in addition to those to which a port of entry is entitled shall be authorized only if the Board finds that existing or authorized zones will not adequately serve the convenience of commerce.*

19 U.S.C. § 81b(b) (emphasis added). Thus, in considering an application for the grant of an additional zone, the Board must consider whether "existing or authorized zones will not adequately serve the convenience of commerce."

The Board contends it followed the statutory mandate. In its briefs to this Court, defendant explains the Board has interpreted § 81b as "requiring a review that considers whether the additional zone will serve the 'public interest.'" Defendant further argues "the Board's analysis of the 'public interest'—with consideration of local economic effects, including the economic development factors reviewed in this case—is fully consistent with the purposes of the [FTZA]."

The Court observes that "Congress has delegated a wide latitude of judgment to the Foreign-Trade Zones Board to respond to and resolve

[16] The Court notes that P.R. 67 reflects additional awareness of the submission of post-comment period comments. *(See* P.R. 67 at 1 ("We recently learned of a late addition to the Board's file on this application.").)

the changing needs of domestic and foreign commerce through the trade zone concept." *Armco Steel*, 431 F.2d at 788. This wide latitude of judgment, however does not extend to the alteration of statutory language. While "public interest" considerations may play a role in a "convenience of commerce" analysis, the terms are not necessarily synonymous. "Public interest" is a broader term, and hence public interest considerations may include factors largely unrelated to the "convenience of commerce." *See Conoco IV*, 19 CIT at ____, 885 F. Supp. at 272 ("'[P]ublic interest' is a broad and ever-changing phrase."). For example, if the Board's decision rested solely on state and local officials' legitimate desire to revive in the public interest an economically depressed area without considering if "existing or authorized zones will not adequately serve the convenience of commerce" as § 81b(b) requires, the Court would hold the decision of the Board did not meet the requirements of the statute.

In the instant case, the Court cannot ascertain, however, what factors served as the basis for the Board's approval of the Wynwood application, and accordingly, the Court cannot discern whether the Board performed the appropriate statutory analysis. Defendant's briefs to this Court do appear to marshal sufficient and appropriate evidence supporting the Board's approval of the Wynwood application. (*See* Fed. Defs.' Opp'n at 24–26.)[17] Defendant indicates this evidence is found in the Examiners Committee report.[18] No such evidence is discussed or pointed out, however, in the *Wynwood Grant*.

According to defendant's explanation to this Court, the "Examiners Committee report summarizes the application and record, the proposal and its economic impact, policy considerations, and concludes with *a non-binding recommendation* for the FTZ Board." *Id.* at 5 (emphasis added).) The Examiners Committee report, defendant further explains, is attached to a "decision 'package'" submitted to the Board's chairperson. Because the Examiners Committee report contains only a summary and *non-binding* recommendation that was submitted as part of a decision package to the ultimate decision maker, this Court cannot conclude that certain factors listed in the Examiners Committee report served as the basis for the decision maker's decision.

The decision memorandum[19] also does not aid defendant's case. First, according to defendant, the decision memorandum is another part of the "decision 'package'" prepared for the Board's chairperson. This statement indicates to the Court that the decision memorandum is not the

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[17] For example, defendant explains "[t]he local business community expressed the view that there was a need for additional zone services," (Fed. Defs.' Opp'n at 24 (emphasis omitted)):

> These companies require a location near the port because their products will be shipped from Miami by ocean freight * * *. The Wynwood project is located in the Port of Miami area, whereas FTZ 32 has sites near Miami International Airport. While the majority of FTZ 32's incoming shipments arrive at the port, most leave from the airport. Wynwood is seeking to attract users whose inbound and outbound shipments require ocean freight.

(P.R. 105 at 9, *quoted in* Fed. Defs.' Opp'n at 24.)

[18] (P.R. 105.)

[19] (Decision Mem. (date stamped Nov. 13, 1991), *reprinted in* App. to Pl.'s Mot. for Summ. J. Tab 8.).

appropriate document to look to in order to ascertain which facts on the record served as the basis for the grant.

Second, although the decision memorandum does frame the "main issue in this case [as] whether the additional zone is needed to serve the convenience of commerce,"[20] the decision memorandum does not point out or discuss factors appropriate for a consideration of the "convenience of commerce." In defendant's brief to this Court, defendant does offer a discussion of factors going to the "convenience of commerce" which defendant attributes to the Examiners Committee report. For example, defendant explains the Examiners Committee report made the following finding: "A survey of over 190 companies indicated that 'existing foreign-trade zone facilities in the Miami area are not fully serving the needs of the ocean freight-related activity near the Port of Miami.'" (Fed. Defs.' Opp'n at 24 (quoting P.R. 105 at 7).) Although this evidence would appear to relate to a consideration of the "convenience of commerce," neither this survey and nor other such evidence relevant to the "convenience of commerce" are mentioned in the decision memorandum. The decision memorandum does state that "[t]he record contains evidence of a general economic basis for expanding the area's zone facilities and services." (Decision Mem. at 1.) The memorandum, however, is substantially devoted to summarizing the "public interest" benefit of granting the Wynwood:

> [The record] indicates that economic development in the Wynwood community is a high priority for both state and local officials. Wynwood is located in one of three Florida State Enterprise Zones which offer substantial state and local tax incentives to attract new business and employment activities to the state's most economically depressed areas. This designation is an indication of the priority state and local officials have given to economic development in Wynwood. *It is a basis for the examiners committee's findings that there is a special need for zone services in the Wynwood community, and that the existing zone will not adequately serve the "convenience of commerce" for this purpose.*
>
> * * * The main consideration in cases involving proposals for additional zones is whether the public interest would be better served by the establishment of the additional zone project, notwithstanding the competitive effect on the existing zone.

(*Id.* at 1–2.) The Court further notes that contrary to defendant's claim that the Board "subsequently adopted" the Examiners Committee report, it does not appear the decision memorandum adopts or adopts by reference relevant factors listed in the Examiners Committee report. Thus, even if the Court were to find the decision memorandum an appropriate document for the Court to examine to ascertain the Board's basis for the grant, the Court cannot discern which factors served as the basis for the grant—the factors going to public interest, or factors relevant to the convenience of commerce.

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[20] (Decision Mem. at 1.)

As discussed in *Conoco III,* where an

> "administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive."

Conoco III, 18 CIT at ____, 855 F. Supp. at 1311 (quoting *SEC v. Chenery Corp.,* 332 U.S. 194, 196–97 (1947)). The Court finds the Board's decision to approve the Wynwood application does not contain an understandable basis that would permit this Court to determine whether the Board acted within the scope of its authority. The notice the Board published to announce its decision simply does not indicate on what basis the Board approved the application. *See Wynwood Grant,* 56 Fed. Reg. at 61,227. The Court, therefore, remands this action to the Board so that it may explain fully it basis for approving the Wynwood application and point out what evidence on the record it relied upon in reaching that determination.

CONCLUSION

The Court holds plaintiff was not deprived of due process. Plaintiff's request for a remand for the purpose of holding an evidentiary hearing is denied. Because the Court cannot discern whether the Board followed its statutory mandate in granting the zone application, however, *Application of Wynwood Community Economic Dev. Corp.,* 56 Fed. Reg. 61,227 (Dep't Comm. 1991) (resolution and order), is remanded so that the Board may explain fully its basis for approving the Wynwood application and point out what evidence on the record it relied upon in reaching that determination.

(Slip Op. 96–22)

SGI, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 92–05–00359

Plaintiff contests Customs' classification under the Harmonized Tariff Schedule of the United States (HTSUS) of imported "Chill" coolers, portable soft-sided vinyl insulated coolers designed for storage of food or beverages at a cold temperature over time and for carrying such coolers from place to place. The imports are the same in all material respects as the merchandise involved in *Sports Graphics, Inc. v. United States,* 12 Fed. Cir. (T) ____, 24 F.3d 1390 (1994), *aff'g* 16 CIT 919, 806 F. Supp. 268 (1992), decided under the Tariff Schedules of the United States (TSUS).

Upon liquidation of the entries, Customs classified the coolers under subheading 4202.92.45, HTSUS, as "Travel, sports and similar bags: * * * Other [than with outer surface of textile materials]." Defendant asserts that if Customs' classification cannot be sustained, then alternatively, the coolers are properly dutiable, at the same rate assessed in

liquidation, as "Other" similar containers under subheading 4202.92.90, HTSUS, similar to the named exemplars in Heading 4202. Plaintiff claims that the coolers are properly dutiable, alternatively under various subheadings of Chapter 39, HTSUS.

Plaintiff claims that *Sports Graphics*, which excluded the coolers from classification under the TSUS luggage provisions, is also controlling under the HTSUS. Defendant contends that *Sports Graphics* does not apply under the HTSUS. The parties agree there are no genuine disputed issues of material fact for trial and cross-move for summary judgment.

Held: *Sports Graphics* does not apply in determining the scope of Heading 4202, HTSUS, and therefore, plaintiff's motion for summary judgment is denied. However, the coolers are not encompassed by Customs' classification under subheading 4202.92.45 and, accordingly, defendant's cross-motion for summary judgment sustaining Customs' classification and dismissing this action is also denied. The merchandise is classifiable under subheading 4202.92.90, HTSUS, as alternatively claimed by defendant, which precludes classification of the merchandise under Chapter 39. Therefore, summary judgment for defendant is granted sustaining the alternative classification.

(Dated January 19, 1996)

Meeks & Sheppard (Ralph H. Sheppard, Lisa Levaggi Borter), for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice *(Barbara M. Epstein, Amy M. Rubin); Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

OPINION

CARMAN, *Judge:* Plaintiff, SGI, Incorporated of Cranston, Rhode Island, imports "Chill" coolers from Taiwan, China, and Hong Kong. The imports consist of portable soft-sided vinyl coolers used for storage of food or beverages at a cold temperature over time, which may be carried by handles or straps. The merchandise is identical to the coolers in *Sports Graphics, Inc. v. United States*, 12 Fed. Cir. (T) ____, 24 F.3d 1390 (1994), *aff'g* 16 CIT 919, 806 F. Supp. 268 (1992),[1] involving entries during the 1986 through 1988 period and, therefore, classified under the Tariff Schedules of the United States (TSUS).

The relevant provisions of the Harmonized Tariff Schedule of the United States (HTSUS) are as follows:

CHAPTER 42

* * * * * * *

Additional U.S. Notes:

1. For the purposes of heading 4202, the expression *"travel, sports and similar bags"* means goods, other than those falling in subheading 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading * * *.

* * * * * * *

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases,

[1] Unless the Court cites specifically to the U.S. Court of International Trade (CIT or Court) opinion or the United States Court of Appeals for the Federal Circuit (CAFC) opinion, all references to *Sports Graphics* include both opinions.

	camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of plastic sheeting, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials:	
	Articles of a kind normally carried in the pocket or in the handbag:	
	Other:	
4202.92	With outer surface of plastic sheeting or of textile materials:	
	Travel, sports and similar bags:	
	With outer surface of textile materials:	
4202.92.45	Other	20%
	Other:	
4202.92.90	Other	20%

BACKGROUND

Upon liquidation of the entries, the merchandise was classified by the United States Customs Service (Customs) under subheading 4202.92.45, HTSUS, and assessed the schedule duty rate of 20% *ad valorem*, except Entry No. 137–1014490–1 covered by Court No. 91–06–00413.[2]

Defendant claims that if the classification invoked by Customs in liquidation is determined by the Court to be incorrect, then defendant urges alternatively that the imports are classifiable as "similar containers," *i.e.*, similar to the exemplars named in Heading 4202, and dutiable at the same rate, 20% *ad valorem*, under subheading 4202.92.90, HTSUS.

Plaintiff challenges Customs' classification and opposes defendant's proposed alternative classification, both under Heading 4202, and claims various alternative classifications under Chapter 39, HTSUS: Heading 3923, covering "Articles for the conveyance or packing of goods, of plastics * * *," dutiable at the rate of 3% *ad valorem;* Heading 3924 covering "Tableware, kitchenware, other household articles and toilet articles, of plastics," dutiable at the rate of 3.4% *ad valorem;* and Heading 3926, the residual provision for articles of plastics, dutiable at the rate of 5.3% *ad valorem*.

As a classification dispute, the Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988) and this action is before the Court for *de novo* review under 28 U.S.C. § 2640(a)(1) (1988). Currently before the Court are cross-motions for summary judgment pursuant to U.S. CIT R. 56. The cross-movants agree, and the Court finds, there are no genuine dis-

[2] *See infra* note 11.

puted material issues of fact for trial and the action may be decided on motion for summary judgment under Rule 56.

For the reasons set forth below, plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment sustaining Customs' classification and dismissing the action is denied; summary judgment sustaining defendant's proposed alternative classification is granted.

THE RECORD

As evidentiary support of its motion, plaintiff submits an affidavit of Jeffrey Jacober, President of SGI, Incorporated, successor to Sports Graphics, Incorporated, plaintiff in *Sports Graphics, supra. (See* Affidavit of Jeffrey Jacober (Jacober Aff.) ¶ 1.) Defendant has submitted the declaration of Dan Chojnacki, President of Domestic Bag Company, Incorporated in Akron, Ohio. *(See* Decl. of Dan Chojnacki, *reprinted in* Def.'s Resp. to Pl.'s Opp'n to Def.'s Cross-Mot. for Summ. J. Ex. C.) Additionally, both parties have submitted various documentary exhibits, some appended to the foregoing affidavit and declaration,[3] and various Customs rulings under the TSUS to which reference is made by the parties in their briefs.

The recently decided case of *Totes, Inc. v. United States,* 18 CIT ____, 865 F. Supp. 867 (1994), *aff'd,* 14 Fed. Cir. (T) ____, 69 F.3d 495 (1995), also discussed *infra,* articulates the common characteristics and purposes of the exemplar containers under Heading 4202, which holding, of course, is binding on this Court.

Certain marketing or advertising literature depicting coolers and various other bags, claimed by defendant to be distributed by bag manufacturers, is appended to defendant's memoranda of law and is relied on by defendant in its response to *factually* establish that plaintiff's "Chill" coolers are of the same class or kind of merchandise as that marketed by the identified bag manufacturers, and the exemplar containers named in Heading 4202. These appended marketing materials are properly objected to by plaintiff as being without evidence of authenticity, by affidavit or otherwise, and will not be considered by the Court as evidence on these cross-motions.[4]

Plaintiff's objection to the Chojnacki Declaration and Exhibit 1 attached thereto, which is the declarant's own marketing literature, is totally without merit. Plaintiff's objection to the declaration is grounded, improperly, on the fact that it was not submitted in the form of an affidavit or "sworn statement." Declarations may be used in lieu of affidavits. 28 U.S.C. § 1746 (1988) (authorizing use of unsworn declarations under penalty of perjury in lieu of *inter alia,* affidavits). Because

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[3] Promotional material used to market the "Chill" coolers, appended to the Jacober Affidavit as Exhibit D, is illustrative of the subject merchandise and is included in this opinion as Appendix A.

[4] Nonetheless, the Court points out that the characteristics common to the Heading 4202 exemplar containers for purposes of an *ejusdem generis* analysis of the scope of "similar containers" have been established by *Totes,* which as stated above is binding on this Court.

the declarant's statements authenticate his own marketing literature, plaintiff's authentication objection is also without merit.

Upon consideration of the parties' Statements of Material Facts Not in Issue in accordance with U.S. CIT R. 56(i), the Jacober Affidavit, the Chojnacki Declaration, the facts set forth in *Sports Graphics* as to the design, construction, and purpose of merchandise identical to that at issue here, and the courts' opinions in *Totes,* which articulate the common characteristics and purposes of the Heading 4202 exemplar containers, the Court finds that there is no genuine dispute as to any material facts.

THE FACTS

The subject coolers, marketed by plaintiff under the trade name "Chill," with other designations for specific models of different sizes, are portable soft-sided vinyl food coolers that serve to store food and beverages maintaining a cold temperature over time (as implied by the name "Chill").[5] The imports have an insulative polyethylene closed cell foam approximately ½ inch thick between a vinyl outer shell and vinyl inner liner surrounding the storage space of the cooler. The insulative properties of the coolers is comparable to that of other commercially marketed food coolers, including both hard and soft-sided coolers. The top of the rectangular cooler is secured by a patented zippered interlocking flap. Carrying and portability of the coolers is facilitated by a handle or shoulder strap. There is no dispute that plastic is the component material of chief value. The coolers may be used in a number of locations where food or beverages might be consumed, such as in and around the home and during trips away from home on picnics, sporting, and at spectator and participation sporting events.

DISCUSSION

I

In support of its claim that the coolers are not *ejusdem generis* with the Heading 4202 exemplar containers, plaintiff heavily relies on the holding in *Sports Graphics* that the identical coolers were not *ejusdem generis* with the TSUS luggage exemplars. *(See generally,* Pl.'s Mem. in Support of Mot. for Summ. J. (Pl.'s Br.) at 11–16.)

In *Sports Graphics,* Customs had classified plaintiff's coolers as "Other" articles of "luggage" under item 706.62, TSUS, pursuant to the definitional Headnotes 2(a)(i) and (ii) of Schedule 7, Part 1, Subpart D.[6] *See Sports Graphics,* 16 CIT at 919, 920–21, 806 F. Supp. at 269–70.

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[5] The parties seem to quibble over whether, in addition to storage of food or beverages and maintaining their cold temperature over time, the coolers serve to "preserve" food or beverages. It is, of course, common knowledge that storage in cold temperatures, in addition to enhancing the taste of certain food and beverages, preserves them. Therefore, reference in this opinion to the purpose of the coolers to "store" food or beverages maintaining a cold temperature over time shall be deemed to include "preservation" of the food or beverage items.

[6] The pertinent TSUS provisions read:

Subpart D Headnotes:

2. For the purposes of the tariff schedules —

(a) the term *"luggage"* covers —

(i) travel goods, such as trunks, hand trunks, lockers, valises, satchels, suitcases, wardrobe cases, overnight bags, pullman bags, gladstone bags, traveling bags, knapsacks, kitbags, haversacks, duffel bags, and like articles designed to contain clothing or other personal effects during travel; and

continued

Plaintiff claimed, and the CIT agreed, that the merchandise was not *ejusdem generis* with the TSUS luggage exemplars because "the chief use of the Chill cooler, as with the general class of 'coolers,' is to maintain food and beverages at a desired temperature over a period of time. Such a use is a storage function." *Id.* at 926, 806 F. Supp. at 274. Accordingly, the coolers were properly dutiable under item 772.15, TSUS,[7] as "[a]rticles chiefly used for preparing, serving, or storing food or beverages * * *. Other." On appeal, the CAFC affirmed, holding with respect to *ejusdem generis:*

> The trial court concluded that when determining the classification of the merchandise at issue here, under a proper analysis, the focus should be on whether food or beverage is involved. We agree. In focussing on whether food or beverage is involved, it is clear that the merchandise has a different purpose, the storage of food or beverage, which precludes the merchandise from being *ejusdem generis with the exemplars listed in headnotes 2(a)(i) and 2(a)(ii) of the luggage provision.*

Sports Graphics, 12 Fed. Cir. (T) at ____, 24 F.3d at 1393 (emphasis added).

Plaintiff insists here that this Court's *ejusdem generis* analysis of Heading 4202 is controlled by the *Sports Graphics* analysis of the TSUS luggage provisions, which analysis excluded the identical coolers from the TSUS luggage provisions because the focus was on the coolers' purpose for storage of food or beverage. Defendant urges, for the reasons discussed below, that the Court should decline to follow the *Sports Graphics* analysis of the TSUS luggage provisions and address the classification of food coolers under Heading 4202, HTSUS, as an issue of first impression.

Arguably, of course, if in the classification of coolers under the TSUS luggage provisions an *ejusdem generis* analysis must focus on the purpose of the coolers for the storage of food or beverage, then the same analysis should apply to Heading 4202, unless the HTSUS Heading is materially different from the TSUS luggage provisions and a different result is warranted. The Court holds, essentially for the following reasons urged by defendant, that *Sports Graphics* does not apply to Heading 4202.

First, while defendant recognizes a significant overlap in coverage between Heading 4202 and the TSUS luggage provisions, defendant correctly stresses that Heading 4202 does not purport to be simply a "luggage" definition or provision. Indeed, Heading 4202 makes no refer-

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(ii) brief cases, portfolios, school bags, photographic equipment bags, golf bags, camera cases, binocular cases, guncases, occupational luggage cases (physicians', sample, etc.), and like containers and cases designed to be carried with the person, except handbags as defined herein;

* * * * * * *

Luggage and handbags * * *
Of other material:
Other:
706.62 Other ..... 20% ad val.

[7] In the 1988 TSUS, item 772.15 was changed to 772.16 and the duty rate changed from 4% to 3.4% *ad valorem.* The language in both items remained the same. References herein to item 772.15 shall be deemed to also refer to item 772.16. *See Sports Graphics,* 16 CIT at 919 n.1, 806 F. Supp. at 269 n.1.

ence whatever to the term "luggage." Accordingly, the Court rejects plaintiff's position that Heading 4202, HTSUS, is merely a reenactment of the TSUS luggage definition.

Second, as the rule of *ejusdem generis* requires, the *Sports Graphics* holding was based on the common characteristics running through the specific *statutory* exemplars of the TSUS luggage provisions. The Court agrees with defendant that Heading 4202 is expressly broader than the language of the TSUS luggage provisions. For example, defendant correctly points out that unlike Heading 4202, the TSUS headnotes to Schedule 7, Subpart D exclude such articles as "cases for musical instruments," "cases suitable for pipes or for cigar or cigarette holders," and "cases, purses, or boxes provided for in part 6A of this schedule." Moreover, defendant buttresses its contention that Heading 4202 is far broader in scope of coverage than the TSUS luggage provisions because the Heading includes an expanded and diversified list of exemplar containers, such as shopping bags, holsters, musical instruments cases, map cases, toiletry bags, sports bags, tool bags, jewelry boxes, etc.

Third, defendant stresses that unlike *Prepac, Inc. v. United States*, 78 Cust. Ct. 108, 433 F. Supp. 339 (1977) (holding that insulated picnic bags were classifiable as luggage under the TSUS), in *Sports Graphics*, plaintiff proposed an alternative classification under item 772.15, TSUS, specifically covering articles used for the storage of food. There is no provision under the HTSUS containing the relevant language of item 772.15, TSUS, "[a]rticles chiefly used for preparing, serving, or storing food or beverages." In *Sports Graphics*, the CAFC observed the CIT had distinguished *Prepac* "on the basis that classification under item 772.15, TSUS, was not addressed in that case as it was not presented to the court as an alternative classification." *Sports Graphics*, 12 Fed. Cir. (T) at ____, 24 F.3d at 1392. Analogous to the importer's claims in *Prepac*, none of the classifications under Chapter 39 claimed by plaintiff here expressly specifies food or beverage use. In tariff classification, statutory interpretation under the rule of *ejusdem generis* must be based on "'the essential characteristics or purposes that unite the articles enumerated *eo nomine*.'" *Totes*, 14 Fed. Cir. (T) at ____, 69 F.3d at 498 (quoting *Sports Graphics*, 12 Fed. Cir. (T) at ____, 24 F.3d at 1392), discussed *infra*. As noted above, Heading 4202 is broad in scope. Plainly, absent a competing provision in the HTSUS similar to item 772.15, TSUS, the Court could not justifiably rationalize an interpretation of Heading 4202 that excluded a container because it was used for the storage of food or beverage.

Plaintiff insists that in *Sports Graphics*, the CIT and subsequently the CAFC in excluding the coolers from the TSUS luggage provisions would still have focused on the purpose of the coolers for storage of food or beverage *even if a competing provision like 772.15 were nonexistent*, and classified the merchandise "based on material composition or some other criteria." (Pl.'s Reply to Def.'s Opp'n Br. and Opp'n to Def's Cross-Mot. for Summ. J. at 7.) The foregoing contention is plainly incorrect

given what occurred in *Prepac* where item 772.15 was not claimed by the importer and the insulated picnic bags were held to be classifiable as luggage. As previously observed, *Prepac* was not followed by the CIT in *Sports Graphics* expressly because there was no claim by plaintiff in *Prepac* under item 772.15, TSUS. *See Sports Graphics,* 16 CIT at 923, 806 F. Supp. at 271.

Fourth, in urging the Court to distinguish *Sports Graphics* in construing Heading 4202, defendant relies on the rationale of the CAFC's recent decision in *Totes, supra,* which specifically addresses the scope of Heading 4202 under the rule of *ejusdem generis.* The *Totes* analysis of Heading 4202 fully supports the broad interpretation urged by defendant.

In *Totes,* a motor vehicle "Trunk Organizer," a rectangular case used to organize and store items such as motor oil, tools, and jumper cables in an automobile trunk and held in place in the trunk by Velcro strips affixed to the bottom of the case, was held to be *ejusdem generis* with the container exemplars named in Heading 4202, HTSUS. *See Totes,* 18 CIT at ____, 865 F. Supp. at 869–70, 872. The CAFC in *Totes* rejected appellant-plaintiff's position that following the rationale of *Sports Graphics,* the Trunk Organizers, used to organize and store items in an automobile trunk, served a "different purpose" than the Heading 4202 exemplar containers. *See Totes,* 14 Fed. Cir. (T) at ____, 69 F.3d at 498.

The CAFC found no error in Judge Newman's reasoning in *Totes,* that "Totes' product shares with the containers listed *eo nomine* in subheading 4202.92.9020 the essential characteristics of organizing, storing, protecting, and carrying various items," and that the residual provision for "similar containers" in Heading 4202 has "broad reach." *See id.* at ____, 69 F.3d at 498 (citing *Totes,* 18 CIT at ____, 865 F. Supp. at 872). In *Totes,* Judge Newman held

> [a]s to the broad reach of the residual provision for "similar containers" in Heading 4202 by virtue of *ejusdem generis,* this writer finds it significant that the individual exemplars are disparate in their physical characteristics, *purposes and uses* ranging from such small containers as spectacle and cigarette cases, wallets, and tobacco pouches to such large containers as trunks and suitcases.

Totes, 18 CIT at ____, 865 F. Supp. at 872 (emphasis added).

As further stressed by the CIT in *Totes,* and affirmed by the CAFC, the criteria for being *ejusdem generis* with the named articles for classification purposes under Heading 4202, based on the essential characteristics or purposes that unite the exemplar articles, is whether the subject merchandise is designed to "organize, store, protect and carry various items." *Id.* at ____, 865 F. Supp. at 871–72; *Totes,* 14 Fed. Cir. (T) at ____, 69 F.3d at 498. The "Chill" coolers are plainly designed for the foregoing purposes. There is nothing in Heading 4202 that excludes containers specially insulated and designed for storing food or beverages in a cold condition over a period of time. Indeed, the expanded panoply of enumerated containers described in Heading 4202, designed to protect,

store, and carry wide-ranging products, and some serving the purpose of storing certain consumable products, including pouches and cases for cigarettes and tobacco, leaves little doubt that storage of food in coolers is not a "different purpose" than that served by the Heading 4202 exemplars.

Thus, for application of *ejusdem generis* to Heading 4202, it is the exemplar containers' *purpose or use* for storage, transportation, protection, etc. that is relevant, and *not whether the contents stored and/or carried by the exemplar containers* are food or beverages. Although most of the Heading 4202 exemplar containers are not specifically designed and constructed for storage of food or beverage to maintain a cold temperature over time, precise functional equivalence to, or commercial interchangeability with, particular exemplars enumerated in the Heading is plainly not required by the term "similar" or the rule of *ejusdem generis*. *See Totes,* 18 CIT at ____, 865 F. Supp. at 874.

Plaintiff's contention that the insulation feature of the "Chill" coolers makes them "more than" the containers covered by Heading 4202 is unpersuasive. Certainly, protective cushioning or insulation material to protect the contents from impact damage when stored or carried by common containers such as spectacle cases, camera cases, binocular cases, musical instrument cases, jewelry boxes, bottle cases, etc. would not exclude such containers from classification under Heading 4202 because they are "more than" the named containers. Therefore, the insulative feature of the "Chill" coolers for temperature maintenance of the contents has no relevance in determining whether the merchandise is classifiable under Heading 4202.

II

To support its argument that the coolers are excluded from Heading 4202, plaintiff cites the *Continuity of Import and Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System,* USITC Pub. 2051 (Jan. 1988) *(ITC Report); ITC Report,* Annex I *(Conversion Tables);* H.R. Rep. No. 576, 100th Cong., 2d Sess. 549–550 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582–83 *Conference Report);* and the Congressional goal of tariff neutrality. *(See* Pl.'s Br. at 19–24.) Citing *Semperit Indus. Prods., Inc. v. United States,* 18 CIT ____, 855 F. Supp. 1292 (1994), *Beloit Corp. v. United States,* 18 CIT ____, 843 F. Supp. 1489 (1994), and *Hemscheidt Corp. v. United States,* 18 CIT ____, 858 F. Supp. 223 (1994), *aff'd,* No. 94–1511 (Fed. Cir. Dec. 18, 1995), plaintiff maintains that the neutrality goal of Congress in the TSUS/HTSUS conversion is achieved only by following *Sports Graphics* under Heading 4202 and classifying the merchandise under one of plaintiff's claimed classifications under Chapter 39. The Court disagrees.

The TSUS/HTSUS conversion was effective as of January 1, 1989, while the CIT's *Sports Graphics* decision, issued October 20, 1992, and the CAFC affirmance both occurred well after the conversion date. Accordingly, *Sports Graphics* was not a "prior decision" that the Court

might infer was approved and ratified by Congress in the TSUS/HTSUS conversion and should not be considered instructive in interpreting the HTSUS. As stated in the *Conference Report:*

> [D]ecisions by the Customs Service and the courts interpreting nomenclature under the TSUS are not to be deemed dispositive in interpreting the HTS. Nevertheless, on a case-by-case basis *prior* decisions should be considered instructive in interpreting the HTS, *particularly where the nomenclature previously interpreted in those decisions remains unchanged* and no dissimilar interpretation is required by the text of the HTS.

H.R. Rep. No. 576 at 549–50, *reprinted in* 1988 U.S.C.C.A.N. at 1582–83 (emphasis added).

With respect to prior decisions, at the time of the conversion only *Prepac* would have had any relevance because it held that somewhat analogous merchandise was properly dutiable under the TSUS as luggage. Of course, as previously discussed above, item 772.15, TSUS, was not addressed in *Prepac.*

Moreover, as suggested in the *Conference Report,* "prior decisions" may be considered instructive only to the extent that "the nomenclature previously interpreted in those decisions remains *unchanged* and no dissimilar interpretation is required by the text of the HTS." As emphasized above, the HTSUS nomenclature greatly expands upon and diversifies the types of containers enumerated in the TSUS luggage provision and encompasses numerous goods not commonly thought of as "luggage;" *e.g.,* holsters, musical instrument cases, shopping bags, map cases, tobacco pouches, and jewelry boxes. And, if for no other reason, a dissimilar interpretation under the HTSUS from that in *Sports Graphics* is required here due to the absence in the HTSUS of the pertinent language of item 772.15, TSUS, which was focused on in *Sports Graphics* as the proper classification of the coolers.

In any event, with regard to plaintiff's reliance on the *Conversion Tables,* as pointed out in *Beloit,* 18 CIT at ____, 843 F. Supp. at 1499, and *Hemscheidt,* 18 CIT at ____, 858 F. Supp. at 227, the *ITC Report* cited by plaintiff, which cross-references items under the TSUS with subheadings under the HTSUS, although a relevant guide to the Court's inquiry, is not entitled to great weight; "the conversion cross-reference must in all cases be approached cautiously as a guide to the scope of HTSUS provisions," and "are not intended, nor should they be viewed as a substitute for, the traditional tariff classification process." *Marubeni Am. Corp. v. United States,* 19 CIT ____, Slip Op. 95–168 at 21–22 (Oct. 3, 1995) (citing *ITC Report)* (internal quotations and emphasis omitted); *see also TSUSA/HTSUS Cross Reference Clarification,* 53 Fed. Reg. 27,447 (Customs Serv. 1988) (notice) *(Clarification Notice).*

Among other strong caveats or cautionary remarks concerning improper reliance by the international trade community on the conversion cross-references for classification of merchandise under the HTSUS in lieu of the traditional tariff classification process, the *Clarifi-*

cation Notice underscores that the TSUS/HTSUS cross-references were "designed to assist the user in translating a *known* classification in the TSUSA into a likely classification under the HTSUS." *See Clarification Notice,* 53 Fed. Reg. at 27,447 (emphasis added). The item 772.15, TSUS, classification evolving from *Sports Graphics,* obviously was not a *known* classification on the effective date of the TSUS/HTSUS conversion. Consequently, plaintiff's efforts to establish item 772.15, TSUS, as a "known classification in the TSUSA" for plaintiff's coolers either at the time of the *ITC Report* or as of the effective date of TSUS/HTSUS conversion are unavailing.

As for tariff neutrality in the conversion, plaintiff's coolers in *Sports Graphics,* imported during the 1986 through 1988 period prior to the conversion, were assessed with duty by Customs at the rate of 20% *ad valorem* under item 706.62, TSUS, the luggage provision. Therefore, to the extent that classification of plaintiff's coolers in this case under the HTSUS was intended to be tariff neutral, the assessment of 20% *ad valorem* under Heading 4202, HTSUS, is precisely in harmony with the 20% duty rate assessed by Customs shortly before the TSUS/HTSUS conversion on the 1986 through 1988 entries of identical merchandise in *Sports Graphics.*

III

Plaintiff's reliance on Customs' pre-conversion exclusion of coolers from the TSUS luggage provisions under the *Guidelines for Determining the Scope of the Luggage Provisions of the Tariff Schedules Guidelines)*[8] published in 1984 to supplement the TSUS luggage definitions in Schedule 7, Part 1, Subpart D, Headnote 2, and the various rulings issued under the TSUS, is unfounded for the same reasons set forth by defendant and addressed by the Court in connection with rejection of *Sports Graphics* as controlling under the HTSUS, which discussion need not be repeated.[9] Accordingly, the Court agrees with defendant for the same reasons that the judicial construction of the TSUS luggage provision under *Sports Graphics* does not apply to Heading 4202, the *Guidelines* and rulings under the TSUS are inapplicable to the scope of Heading 4202.

IV

Having accepted the arguments advanced by defendant for inclusion of the merchandise in Heading 4202, the Court now turns to Customs' classification of the coolers, specifically under subheading 4202.92.45,

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[8] Customs H.Q. Mem. CLA–2 CO:R:CV:G 073827 c, *reprinted in* Pl.'s Br. Ex. 6.

[9] Plaintiff's claim that until 1990, Customs consistently classified coolers outside the luggage provisions simply fails as shown by *Sports Graphics* involving the plaintiff's own merchandise, imported during the period of 1986 through 1988, which was classified by Customs under the TSUS luggage provision, item 706.62. *See Sports Graphics,* 16 CIT at 920–21, 806 F. Supp. at 269–70. Presumably, in 1989 when the HTSUS became effective, Congress had been aware that the subject coolers were being classified by Customs under the luggage provisions of the TSUS, and the *Sports Graphics* case overruling that classification and holding that the coolers were described in item 772.15, TSUS, had not yet been decided by the CIT.

HTSUS. "Travel, sports and similar bags" are defined under the HTSUS:

> For the purposes of heading 4202, the expression *"travel, sports and similar bags"* means goods, other than those falling in subheading 4202.11 through 4202.39, *of a kind designed for carrying* clothing and other *personal effects* during travel, including *backpacks and shopping bags* of this heading * * *

Additional U.S. Note 1 to Chapter 42 (additional emphasis added).

First, defendant points to the "backpacks and shopping bags" exemplars in Additional U.S. Note 1 and argues that like such exemplars the coolers are utilized to organize, store, protect, and carry various items, which may include food and beverages. *(See* Br. in Opp'n to Pl.'s Mot. for Summ. J. & in Support of Def.'s Cross-Mot. for Summ. J. (Def.'s Br.) at 12–17.) To support its contention, defendant relies on the Jacober Affidavit, which makes reference to a patented feature of the coolers—a zippered interlocking flap used to secure the top and to maximize the surface area of polyethylene closed cell foam covering the top of the cooler. The patent in question, No. 4,940,173, covers an "improved" backpack having a removable insulated container incorporating the same zippered flap design feature utilized by the "Chill" coolers. The removable insulated container itself, but not the complete backpack, appears similar to the imported coolers.

From the description of the "improved" backpack covered by the patent, it is clear that the insulated container *per se* is not the backpack or similar to the backpack. The insulated container component simply fits within a fabric sleeve incorporated within the backpack body. Thus, plaintiff's patent, labeled "BACKPACK *AND* INSULATED CONTAINER" (emphasis added), explains: "A backpack is provided which has at least one sleeve secured to a panel of the backpack, which sleeve is sized and structured to closely *receive and hold an insulated container that is readily removable from this sleeve, when desired." (See* U.S. Patent 4,940,173, *reprinted in part in* Jacober Aff. Ex. A (emphasis added).) Continuing, the patent explains "[a]nother object of this invention is to provide an improved *combination of a backpack and a removable insulated container.* Another object of the present invention is to provide an improved *combination backpack and insulated container* that is suitable for storing and transporting items that are cooler or warmer than ambient temperature." *(Id.* (emphasis added).)

Defendant also contends the coolers fall within the definition of "travel, sports and similar bags" pursuant to Additional U.S. Note 1 because they are "similar bags * * * of a kind designed for carrying clothing and other personal effects during travel." *(See* Def.'s Br. at 17–18.) According to defendant, food and beverages are included in "personal effects" as that term is defined in *Black's Law Dictionary, i.e.,* chattels, movable or personal property of any kind, as opposed to land. Defendant, however, overlooks that even granting that food and beverages in

small quantities for personal consumption are "personal effects,"[10] as contemplated by Additional U.S. Note 1, Chapter 42, the Note includes the further criterion, "of a kind *designed for carrying.*"

Obviously, food cooler bags having carrying handles or straps are "designed for carrying," but unlike shopping bags and backpacks, which are used simply to organize and *carry* their contents, "the essential purpose of the [Sports Graphics] coolers [is] to store food or beverages in a cold environment for a period of time," *Totes,* 14 Fed. Cir. (T) at ____, 69 F.3d at 498, and such storage purpose is the coolers' "critical purpose and the critical reason why a consumer would purchase the imported merchandise," (Jacober Aff. ¶ 34). Therefore, the specially insulated "Chill" coolers are not encompassed by Additional U.S. Note 1 because the coolers are not "designed for carrying clothing and other personal effects during travel."

V

Because the coolers are not "designed for carrying clothing and other personal effects during travel," like backpacks and shopping bags, it does not follow *ipso facto* that the coolers do not possess the essential common characteristics that unite all of the exemplar containers in Heading 4202. As the Court has found that the coolers are *ejusdem generis* with the exemplar containers in Heading 4202, they are classifiable as "similar containers" within the purview of subheading 4202.92.90, HTSUS, a less specific subheading than subheading 4202.92.45.

As stressed by Judge Newman in *Totes:*

> Totes' additional contention that the trunk organizers are not "similar containers" within the purview of Heading 4202 because they are not tool bags *per se* (which defendant concedes) is of no avail in defeating classification pursuant to Heading 4202. The question is [not whether the import is a tool bag or similar only to a tool bag, but] * * * whether or not the item at issue does have characteristics in common with [all] the enumerated articles [in Heading 4202]. Precise functional equivalence to, or commercial interchangeability with, any one particular exemplar enumerated in the Heading plainly is not required by the rule of *ejusdem generis.*

Totes, 18 CIT at ____, 865 F. Supp. at 874 (internal quotations and citations omitted) (brackets added in *Totes).*

Thus, to be classifiable as "similar containers" under Heading 4202 by operation of *ejusdem generis,* the imports need not be backpacks, shopping bags, any other exemplar container in the Heading, or similar to any particular named exemplar in functional equivalence or commercial interchangeability, any more so than there is functional equivalence or interchangeability between or among any of the other exemplar containers.

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[10] The Court notes that in *Prepac,* the Customs Court declared that "food or beverage is not ordinarily considered personal effects." *See Prepac,* 78 Cust. Ct. at 111, 433 F. Supp. at 341. In view of the conclusions reached herein, the Court need not definitively decide that issue.

Defendant maintains that in the event Customs' classification under subheading 4202.92.45 is found to be incorrect, the Court should alternatively hold the imports are encompassed by the residual provision for "similar containers" in Heading 4202 and classifiable under the subheading "Other" in 4202.92.90. *(See* Def.'s Br. at 19–20.) The latter residual subheading also specifies a duty rate of 20% *ad valorem*.

In sum, the coolers are *ejusdem generis* with the Heading 4202 exemplars because they share the essential characteristics of organizing, storing, protecting, and carrying various items. *See also Totes*, 14 Fed. Cir. (T) at ____, 69 F.3d at 498. Accordingly, the Court concludes that the coolers are classifiable under subheading 4202.92.90, HTSUS, as alternatively claimed by defendant.

VI

Sustaining defendant's proposed alternative classification under Heading 4202, specifically under subheading 4202.92.90, obviates addressing plaintiff's claimed provisions under Chapter 39 and the numerous legal and factual obstacles raised by defendant to those classifications. Succinctly put, merchandise classifiable under Heading 4202 is precluded from classification under Chapter 39, HTSUS, pursuant to Chapter Note 2(h), which expressly does not include containers classifiable under Heading 4202. Consequently, relative specificity is not presented in this case.

CONCLUSION

Both Customs' classification under subheading 4202.92.45, HTSUS, and plaintiff's claimed classifications under Chapter 39 are found inapplicable. Defendant's proposed alternative classification under subheading 4202.92.90 is found to encompass the merchandise and is determined on the record before the Court to be the legally appropriate classification. Such classification specifies the same duty rate as that assessed in liquidation, 20% *ad valorem*, and therefore reliquidation of the entries is not required for assessment of the correct duty rate and amount of duty, excepting Entry No. 137–1014490–1 covered by Court No. 91–06–00413.[11]

It is observed that defendant raised its proposed alternative classification without formal counterclaim, assertedly because the rate of duty under such alternative classification is the same as that assessed in liquidation. Whether or not defendant interposes a counterclaim in furtherance of its alternatively proposed classification in this case, it is still incumbent upon the Court to affirmatively reach the correct classification and enter judgment accordingly. *See Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984).

Accordingly, plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment sustaining Customs'

[11] Based on the parties' statements of material facts not in issue and responses thereto, there is no dispute that the merchandise in Entry No. 137–1014490–1 covered by Court No. 91–06–00413 was not assessed duty by Customs under 4202.92.45, HTSUS, at the rate of 20% *ad valorem*. Accordingly, the Court directs reliquidation of that entry consistent with this opinion.

classification and dismissing the action is denied; however, summary judgment for defendant is granted sustaining its proposed alternative classification under subheading 4202.92.90, HTSUS, and the rate of duty assessed in liquidation at 20% *ad valorem*. Judgment is entered accordingly directing reliquidation of only Entry No. 137–1014490–1, covered by Court No. 91–06–00413.

Counsel for both parties have, to their credit, submitted thorough, clear, and exhaustive memoranda of law covering the issues presented, which have been carefully reviewed and researched by the Court. The CIT's decision in *Sports Graphics* was authored by the writer who, therefore, has that advantage in explicating this Court's rationale, as affirmed by the CAFC. The Court does not believe that counsels' oral elucidation of the parties' positions or contentions would be productive or further advance the interests of the parties. Accordingly, in view of the foregoing, and in the interest of judicial economy, and importantly, a speedy disposition of this long-pending action, the Court is exercising its discretion to deny plaintiff's motion for oral argument.

SCHEDULE OF CONSOLIDATED CASES

SGI, Incorporated v. United States, Court No. 90–06–00267.
SGI, Incorporated v. United States, Court No. 91–06–00413.

NOTE: **APPENDIX A** to this opinion has been omitted. For additional information contact the Office of the Clerk, U.S. Court of International Trade.

(Slip Op. 96–23)

INA WALZLAGER SCHAEFFLER KG AND INA BEARING CO., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 93–06–00352

Plaintiffs move this Court for judgment upon the agency record pursuant to Rule 56.2 of this Court regarding the final scope ruling issued on June 1, 1993 by the United States Department of Commerce, International Trade Administration ("Commerce"), in which Commerce determined that certain antifriction bearings ("AFBs") from Germany having a length-to-diameter ratio of less than 4 to 1 constitute cylindrical roller bearings ("CRBs") and fall within the scope of the antidumping order entitled *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany ("Antidumping Duty Order")*, 54 Fed. Reg. 20,900 (May 15, 1989). Plaintiffs contend that Commerce's scope ruling improperly expands the scope of the Antidumping Duty Order on CRBs from Germany.

Held: The Court upholds Commerce's classification of plaintiffs' AFBs having a length-to-diameter ratio of less than 4 to 1 as cylindrical roller bearings within the scope of the Antidumping Duty Order on CRBs from Germany.

[Plaintiffs' motion denied; case dismissed.]

(Dated January 19, 1996)

Arent Fox Kintner Plotkin & Kahn (Stephen L. Gibson and *Peter L. Sultan)* for plaintiffs.
Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis)* for defendant.
Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, John R. Cannon, Jr., Geert De Prest and *Patrick J. McDonough)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, INA Walzlager Schaeffler KG, a German exporter of antifriction bearings ("AFBs"), and INA Bearing Company, Inc., a United States importer of AFBs from Germany (collectively "INA"), move this Court for judgment upon the agency record pursuant to Rule 56.2 of this Court regarding a final letter ruling issued by the United States Department of Commerce, International Trade Administration ("Commerce"), on June 1, 1993. The administrative determination in issue is entitled *"Final Scope Ruling—Antidumping Duty Orders on Antifriction Bearings (Other Than Tapered Roller Bearings) From Germany: INA Walzlager" ("INA Determination"). See* Memorandum of June 1, 1993 from Holly A. Kuga, Director, Office of Antidumping Compliance, Public Record ("P.R.") Document No. 8. In the INA Determination, Commerce found that INA's antifriction bearings having a length-to-diameter ratio of less than 4 to 1 constitute cylindrical roller bearings ("CRBs") and fall within the scope of the antidumping order entitled *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany ("Antidumping Duty Order"),* 54 Fed. Reg. 20,900 (May 15, 1989). *INA Determination* at 1, 6.

By its motion for judgment on the agency record, INA seeks an order reversing Commerce's scope ruling and establishing that INA's Series NRB needle rollers, Series K needle roller and cage assemblies, Series RNA 49 needle roller bearings, Series HK drawn cup needle roller bearings, and Series AXK axial needle roller and cage assemblies with roller length-to-diameter ratios of less than 4 to 1 (hereafter "subject bearings"), are needle roller bearings ("NRBs") and, therefore, fall outside the scope of the dumping order on CRBs from Germany. *Memorandum of Points and Authorities in Support of Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record ("Plaintiffs' Brief")* at 1–2, 25.

BACKGROUND

On March 31, 1988, The Torrington Company ("Torrington") filed an antidumping duty petition on behalf of the domestic industry producing AFBs other than tapered roller bearings. The petition covered, among other products, cylindrical and needle roller bearings. On April 27, 1988, Commerce initiated an antidumping duty investigation on AFBs from Germany. *Initiation of Antidumping Duty Investigation; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 53 Fed. Reg. 15,073 (1988). Preliminarily, Commerce determined that AFBs from Germany were being,

or were likely to be, sold in the United States at less than fair value ("LTFV"). *Preliminary Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 53 Fed. Reg. 45,353 (1988). Commerce found that the products under investigation constituted five separate classes or kinds of merchandise, *viz.*, (1) ball bearings; (2) spherical roller bearings; (3) cylindrical roller bearings; (4) needle roller bearings; and (5) spherical plain bearings. *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany ("Final Determination"),* 54 Fed. Reg. 18,992, 18,997–19,004 (May 3, 1989). Commerce's final LTFV determination was in the affirmative. *Final Determination,* 54 Fed. Reg. at 18,992.

The International Trade Commission ("ITC") subsequently determined that an industry in the United States is materially injured by reason of LTFV imports of CRBs from Germany. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and The United Kingdom ("ITC Final Determination"),* USITC Pub. 2185 at 3, Inv. Nos. 303–TA–19 and 20 and 731–TA–391–399 (May 1989), 54 Fed. Reg. 21,488 (USITC May 18, 1989) (final). The ITC, however, made a negative determination with respect to NRBs. *ITC Final Determination* at 3, 54 Fed. Reg. at 21,489.

On May 15, 1989, Commerce issued antidumping duty orders covering CRBs, but excluding NRBs. *Antidumping Duty Order,* 54 Fed. Reg. at 20,900.

On June 28, 1993, INA commenced this action and on September 1, 1993, Torrington intervened opposing INA's challenge. On March 10, 1995, the Court granted INA's motion for a preliminary injunction, enjoining the liquidation of INA's entries of Germany-origin AFBs pending disposition of this case.

Standard of Review

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

DISCUSSION

INA contends that the INA Determination improperly utilized a "4 to 1" length-to-diameter ratio test to distinguish CRBs from NRBs. *Plaintiffs' Brief* at 1–25. According to INA, Commerce's application of the 4 to 1 test unlawfully expands the scope of the Antidumping Duty Order on AFBs from Germany. *Id.*

Among other arguments, INA contends that although the Court, in *Koyo Seiko Co v. United States,* 17 CIT 1076, 834 F. Supp. 1401 (1993), upheld the 4 to 1 test as applied in another scope ruling, *Koyo Seiko* is distinguishable from the case at bar. Specifically, INA contends that, in *Koyo Seiko,* the Court agreed with Commerce that reference to the petition, the preliminary and final investigation determinations by Commerce and the ITC, and previous Commerce notices such as the notice of the LTFV investigation initiation, as well as ITC publications, did not provide dispositive guidance regarding the scope of the order. *Plaintiffs' Brief* at 23–24. According to INA, the case at bar differs factually from *Koyo Seiko* because the INA Determination states that the ITC's guidance was dispositive. *Id.* at 24. INA maintains that this alleged inconsistency invites a reexamination of the reasoning and sources on which Commerce based the INA scope ruling. *Id.*

The Court has ruled on this issue, upholding Commerce's classification of bearings with a length-to-diameter ratio of less than 4 to 1 as cylindrical roller bearings within the scope of the relevant antidumping duty order on CRBs in both *NTN Bearing Corp. of Am. v. United States,* 19 CIT ____, ____, Slip Op. 95–165 at 42 (Oct. 2, 1995), and *Koyo Seiko Co. v. United States,* 17 CIT at 1076, 834 F. Supp. at 1401. The Court of Appeals for the Federal Circuit affirmed this Court's determination in *Koyo Seiko* in a *per curiam* decision dated July 18, 1994.

Moreover, the Court disagrees with INA that Commerce took a different position in this case than it did in the *Koyo Seiko* case *i.e.,* to the effect that the ITC report was dispositive). The record clearly shows that, to resolve the question in issue, Commerce turned to prior determinations, including the Final Determination on the Request by FAG [FAG Kugelfischer Georg Schaefer KGaA] for Exclusion of Certain Engine Crank Shaft and Engine Main Shaft Pilot Bearings from the Scope of *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany ("FAG Determination"),* P.R. Document No. 2 (December 23, 1991). *See INA Determination* at 3. As explained in the FAG Determination, Commerce followed the first criteria contained in 19 C.F.R. § 353.29(i) (1993),[1] determining "that the length-to-diameter ratio of a bearing is the key factor to distinguish a needle roller bear-

[1] 19 C.F.R. § 353.29(i) states:

(i) *Other scope determinations.* With respect to those scope determinations that are not covered under paragraph (e) through (h) of this section, in considering whether a particular product is within the class or kind of merchandise described in an existing order, the Secretary will take into account the following:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission.

continued

ing from a cylindrical roller bearing." *FAG Determination* at 8. Because the petition stated that NRBs "generally" have a length-to-diameter ratio of 2.5 to 1 and the ITC had stated that needle roller bearings "often" have a length-to-diameter ratio that is "at least" 4 to 1, Commerce did not have a dispositive means of differentiating CRBs from NRBs. *Id.* at 7–8; *INA Determination* at 3. To resolve the inconsistency, Commerce turned to the second set of criteria contained in 19 C.F.R. § 353.29(i)(2), as that standard is espoused in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983), *i.e.*, the so-called "*Diversified Products*" criteria.[2] *FAG Determination* at 8–12; *INA Determination* at 3–6; *Final Determination*, 54 Fed. Reg. at 18,998–99.[3] Accordingly, Commerce determined that "the ratio of 4 to 1, as selected by the ITC in its final determination, is the dispositive ratio in defining the physical characteristics of a needle roller bearing." *FAG Determination* at 9.

INA has presented no new arguments here and the products in issue and those involved in *Koyo Seiko*, 17 CIT at 1076, 834 F. Supp. at 1401, are identical, *i.e.*, AFBs with length-to-diameter ratios of less than 4 to 1. In light of the above, INA's challenge fails.

CONCLUSION

As the subject bearings do not meet the minimum length-to-diameter ratio of needle roller bearings as determined by the ITC and Commerce's 4 to 1 test for distinguishing cylindrical roller bearings from needle roller bearings has received appellate scrutiny and passed muster, the Court sustains Commerce's final scope ruling concerning INA's AFBs and parts. Therefore, the motion at bar is denied, the preliminary injunction granted on March 10, 1995 is dissolved, and this action is dismissed.

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(2) When the above criteria are not dispositive, the Secretary will further consider:
(i) The physical characteristics of the product;
(ii) The expectations of the ultimate purchasers;
(iii) The ultimate use of the product; and
(iv) The channels of trade.

[2] The *"Diversified Products"* criteria are the following: (1) general physical characteristics of the merchandise, (2) expectations of the ultimate purchaser, (3) the channels of trade in which the merchandise moves, (4) the ultimate use of the foreign merchandise, and (5) cost of that merchandise. *Diversified Prods.*, 6 CIT at 162, 572 F. Supp. at 889.

[3] Commerce's Final Determination notes the fifth *"Diversified Products"* criteria as "the manner of advertising and display." *Final Determination*, 54 Fed. Reg. at 18,999.

(Slip Op. 96–24)

MARUBENI AMERICA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–10–00730

[Plaintiff's motion for rehearing of summary judgment of dismissal entered for defendant is denied.]

(Dated January 23, 1996)

On the Motion:

Fitch, King and Caffentzis (Richard C. King, Esq.) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Leibman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(James A. Curley,* Esq.); *Jacob D. Diamond,* Esq., Office of the Assistant Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION AND ORDER

NEWMAN, *Senior Judge:* Plaintiff moves pursuant to CIT Rule 59(a) for rehearing of this court's decision in Slip Op. 95–168 of October 3, 1995, which granted defendant's cross-motion for summary judgment dismissing this action. Familiarity with the initial opinion is assumed herein. At this juncture, it must be noted that most of the points now raised by plaintiff are a reargument of matters previously addressed, with perhaps some further elaboration and emphasis. Such reargu-ments are not a proper purpose for a motion for rehearing. *Simpson v. Liberty Mut. Ins. Co.,* 148 F.R.D. 621 (W.D. Ark., 1993); *Keyes v. National R.R. Passenger Corp.,* 766 F. Supp. 277 (E.D. Pa. 1991). *See also, Channel Master, Div. of Avnet, Inc. v. United States,* 11 CIT 876, 877, 674 F. Supp. 872, 873 (1987), *aff'd,* 856 F.2d 177 (Fed. Cir. 1988); *Oak Laminates v. United States,* 8 CIT 300, 601 F. Supp. 1031 (1984), *aff'd,* 783 F.2d 195 (Fed. Cir. 1986). However, the court finds that the issues discussed below are of sufficient complexity to merit further review and supplemental explanation herein.

For the reasons set forth below, plaintiff's motion is denied.

I

When a tariff term is not specifically defined in the Harmonized Tariff Schedule of the United States (HTSUS) and its intended meaning is not indicated in its legislative history, the term's correct meaning is its common meaning. *Mita Copystar America v. United States,* 21 F.3d 1079 (Fed. Cir. 1994). In contending that the internal spiral ridges and grooves of the imports fall within the common meaning of "threads," as defined in various lexicographic, scientific, and encyclopedic authorities, plaintiff stressed *structural form,* as to which there is no dispute of fact. However, to the extent that the common meaning of the term "threads" may have a *functional* as well as *structural* connotation, plaintiff posited that in performing its heat transfer function, the import's spiral ridges and grooves "transmit motion." Accordingly, argued plaintiff, the import's spiral ridges and grooves meet both the

structural and functional connotations of the common meaning of "threads," and therefore, the imports are "threaded" within the definition of tubes and pipes in Note 1(h) to Chapter 74, HTSUS.

In support of its motion for rehearing, plaintiff now contends the declaration of defendant's expert Dr. Thomas J. Rabas, that in its function of heat transfer there is no "transmission of motion" from the spiral grooving to the refrigerant fluid, made transmission of motion a disputed issue of fact for trial. The court disagrees.

Solely in response to plaintiff's *bald contention* that the heat transfer function of the spiral grooving involves transmission of motion, Dr. Rabas explained in his declaration the mechanical concept of "transmission of motion" and opined that the fins and grooves of the imported product do not transmit motion within the meaning of that concept. Rabas Decl. at 4. Counsel for plaintiff, however, has submitted no affidavit or any other evidence whatever either affirmatively substantiating plaintiff's factual assertion as to transmission of motion, or in contravention of the Rabas declaration. Plaintiff's bald contention of fact regarding transmission of motion in the heat transfer function of the spiral grooving – unsupported by an affidavit or declaration of a competent witness, or by any other evidentiary support in the record – is patently insufficient to raise a genuine issue of fact for trial. Fundamentally, of course, factual contentions advanced by a party in support of a motion for summary judgment unsupported by affidavit or other evidence, are insufficient to raise a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Totes, Inc. v. United States*, 865 F. Supp. 867, 873, *aff'd*, 69 F.3d 495 (Fed. Cir. 1995); *Tropi-Cal v. United States*, 63 Cust. Ct. 518, 521, C.D. 3945 (1969).

In furtherance of its efforts to now demonstrate that transmission of motion is a "genuine" issue of fact for trial, plaintiff also maintains that the court impermissibly assessed the credibility of Dr. Rabas when noting that he was "a highly qualified engineering specialist in heating, refrigeration and airconditioning equipment and an expert in heat transfer." Slip Op. 95–168 at 11. Rule 56(f) requires that "supporting and opposing affidavits * * * show affirmatively that the affiant is *competent* to testify to the matters stated therein." The observation in the initial opinion regarding the declarant's expertise in heat transfer is simply a finding in compliance with Rule 56(f) of the witness' competence, not credibility, relative to the issues addressed in the declaration. Since plaintiff submitted no evidence on the point, the court's reference to the Rabas declaration plainly does not suggest that a genuine issue of fact was "tried by affidavit," as mistakenly contended by plaintiff.

Plaintiff's assertion that the Rabas declaration is controverted by the declaration of Mr. Osamu Kawamata, Hitachi's Engineering Manager, submitted by plaintiff, is without basis. Kawamata, a mechanical engineer, does not even mention "transmission of motion" much less state that there is transmission of motion from the ridges and grooves to the

refrigerant fluid. Rather, Kawamata states that the ridges and grooves of the imports "can properly be described as 'threads,' *because they contain as essential elements helical or spiral ridges on a cylindrical body.*" (Exh. 24, par. 8); and that the high lead angle, or low helix angle, of grooves and ridges on the imported tubes "is typical of threads used for purposes of motion, such as those on a ball point pen, and the toy top (plaintiff's Exhibit 23)" (Exh. 24, par. 12). Again, it is stressed that Kawamata states nowhere in his declaration that the spiral ridges and grooves *of the imports* transmit motion to the refrigerant fluid.

Plaintiff's contention that the Rabas declaration is inconsistent with defendant's Clevinger declaration is also completely groundless. In point of fact, Clevinger too expressly states that the ridges and grooves of the imports *do not* transmit power or motion (Decl., par. 4).

Also totally without merit is plaintiff's contention that Rabas' declaration is contradicted by *The Way Things Work* (1971), cited in Slip Op. 95–168, at 14. Dr. Rabas explained that "the transmission of motion occurs when a moving body causes a second body to be placed in motion." Decl., par. 9. The above-mentioned authority states that "screw threads are used for the purpose of fastening (screws and bolts) and for the transmission of motion. *Id.* at 156. "Transmission of motion" relative to screw threads is illustrated by "a *rotating* screw spindle [that] imparts a longitudinal motion to a nut mounted on it." *Id.* (Emphasis added.) Thus, in the example given, the *moving* (rotating) spindle causes the nut to *move* up or down the spindle. The foregoing example is consistent with and illustrates Dr. Rabas' explanation that a moving body *(e.g.,* a spindle) causes a second body *(e.g.,* a nut) to be placed in motion.

As stressed in the initial opinion, there is no dispute that when performing its function of heat transfer, the internal spiral grooving or fins of the imported tubes do not rotate or otherwise move to produce motion in the refrigerant fluid. Rather, the refrigerant fluid (normally moving through the tubes under the impetus of a compressor) simply circulates through the non-moving tube's internal spiral configuration, and although the fluid's directional movement of flow through the tube is clearly *affected* by the internal stationary spiral grooving (indeed, that is its purpose), there is no "transfer of motion" from the stationary grooving to the fluid. As stated by affiant Hajime Ichiki, plaintiff's Marketing Manager, "[t]he pattern of grooves and ridges causes the fluid to rotate up and around the tube, as described in Hitachi U.S. Patent 4,658,892, *as it flows through the tube, pushed by the compressor.*" Exh. 2, par. 13 (emphasis added). There is not the slightest suggestion in either the affidavit or referenced patent that the grooves and ridges move in any fashion to "transmit motion" to the fluid. In point of fact, the patent is clear that the heat transfer characteristics of the imports reflect: (1) the effect of stirring the fluid *due to the unevenness of the inner surface;* (2) the effect of increase in surface area; and (3) the effect of variation in liquid film in the uneven portion.

The short of the matter is that plaintiff itself adduced no evidence supporting its contention concerning transmission of motion from the spiral grooving to the refrigerant fluid, and the court's consideration of the Rabas declaration on that point does not raise a genuine factual issue for trial.

II

Further, with regard to the Rabas declaration, while courts have relied primarily upon lexicons and other similar authorities, courts may and do look to the testimony of record to determine the common meaning of a tariff term, a question of law. *United States v. J.J. Gavin & Co.*, 23 CCPA 288, T.D. 48164 (1936); *United States v. Colonial Commerce Co., Ltd.*, 44 CCPA 18, C.A.D. 629 (1956); *United States v. Mercantile Distribuidora, S.A.*, 43 CCPA 111, C.A.D. 617 (1956); *Atlantic Aluminum & Metal Distributors, Inc. v. United States*, 47 CCPA 88, C.A.D. 735 (1960). Such testimony may properly be considered simply as advisory and as aiding the memory and understanding of the court, and it is not binding and may be accepted or rejected as appears proper. *Tropical Craft Corp. v. United States*, 45 CCPA 59, C.A.D. 673 (1958); *Package Machinery Co. v. United States*, 41 CCPA 63, C.A.D. 530 (1953); *Ameliotex, Inc. v. United States*, 65 CCPA 22, C.A.D. 1200, 565 F.2d 674 (1977).

In the initial opinion, after reviewing the extensive lexicographic, scientific and encyclopedic authorities called to the attention of the court, as well as the uncontradicted Rabas declaration, the court agreed with the government that *as related to tubes and pipes,* the term "threaded" as used in Note 1(h) contemplates spiral grooving *for attachment or coupling of sections of tubes with complementary "threaded" components.* Slip Op. at 11. Dr. Rabas stated that the meaning of "threaded" as related to a tube or pipe refers to "[t]hreading * * * used to join two or more sections of pipe or tube" (Decl., at 3). Since tariff terms are presumed to carry the meaning given them in trade and commerce, testimony regarding the meaning of the term in the trade is highly relevant. *Ameliotex, Inc., supra.* Further, when lexicographic and technical authorities are inconclusive as to the common meaning of a term, the *uncontradicted* testimony of a competent expert witness is entitled to great weight, *United States v. Scruggs-Vandervoort-Barney Dry Goods Co.*, 18 CCPA 279, T.D. 44450 (1930); *Victor Machinery Exchange, Inc. v. United States*, 67 Cust. Ct. 231, C.D. 4279 (1971), and it is proper for the court to consider the interpretation commonly placed on a term in the particular industry involved. *United States v. Colonial Commerce Co., Ltd.*, 44 CCPA 18, C.A.D. 629 (1956). There is no dispute that the spiral grooving of the imports is not used for the purpose of coupling or attachment, and there is no error in relying on the Rabas declaration for the common meaning of "threads" as related to tubes and pipes.

III

As the court has determined that Customs' interpretation of the term "threaded," discussed above, is within the common meaning of that

term, it is apparent that even if "transmission of motion" *in heat transfer* were to be factually established by plaintiff at a trial, such fact would not be material to whether the imports are "threaded" within the common meaning determined by the court. *Since indisputedly the spiral grooving of the imports is not used for attachment or coupling, the spiral grooving does not constitute "threads" as a matter of law, whether or not there is "transmission of motion" in the heat transfer function.* Consequently, whether or not the heat transfer function of the spiral grooving of the imports involves "transmission of motion" is neither a *genuine* nor *material* issue of fact.

IV

Plaintiff contends that the court erred in rejecting the broad definitions of "threads" proffered by plaintiff connoting simply a configuration of spiral ridges and grooves around a cylinder. Specifically, plaintiff complains that the court overlooked, or discounted, at least three definitions from relevant lexicographic and other sources cited by plaintiff that express no criterion of function or purpose. Plaintiff urges that in determining the meaning of tariff terms, the court must take a liberal approach in favor of the importer, especially where the meaning of a tariff term remains in doubt. In that regard, plaintiff cites the well-established rule applied by courts in construing insurance policies containing terms susceptible to more than one interpretation that such ambiguous terms of the policy must be construed against the carrier and most liberally in favor of the insured, *Grayson v. Aetna Ins. Co.*, 308 F. Supp. 922, 926–27. Plaintiff insists that similarly where a tariff term is susceptible to varied reasonable interpretations, the court must resolve the uncertainty against the government and defer to the importer's reasonable interpretation. Hence, plaintiff claims that the court erred in not accepting plaintiff's reasonable construction of the term "threads," based solely on the physical configuration of the spiral grooving, as the common meaning of the term.

Without belaboring the point, it suffices to state that even assuming *arguendo* that plaintiff's interpretation is reasonable—that in the context of defining pipes and tubes only physical configuration is relevant—the rule of interpretation relied on by plaintiff applicable to construing ambiguous insurance clauses in favor of the insured is based on policy considerations totally inapplicable to construction of tariff provisions. Further, the court disagrees with plaintiff that where there are two reasonable interpretations of a tariff term in a classification statute, and a substantial doubt remains as to the meaning Congress intended, the court is required to defer to the importer's interpretation.

It is not at all unusual, indeed it is normal in classification disputes coming before the court, to be presented by the parties with varied and sometimes inconsistent definitions of terms, with each party urging acceptance of the definition that favors the party's claimed classification. However, it does not follow from the foregoing that where doubt still remains after due consideration of the conflicting interpretations of

the parties, the court must defer to the importer's interpretation, if reasonable.

In selecting among varied and inconsistent definitions in determining the common meaning of a tariff term, the Federal Circuit ruled in *Richards Medical Co. v. United States,* 910 F.2d 828 (Fed. Cir. 1990), that "[w]here a tariff term has various definitions or meanings and has a broad and narrow interpretations, *the court must determine which definition best invokes the legislative intent.* Upon reviewing all relevant sources for determining the common meaning of the term, and for the reasons stated in the initial opinion, the court adheres to the government's interpretation of the term "threaded" in Note 1(h) as the meaning intended by Congress.

Plaintiff's contention that the court was required to defer to plaintiff's interpretation is rejected. In a somewhat reverse situation, where it was the *government* that strenuously argued that it's reasonable interpretation was entitled to the benefit of any doubt, the court in *Semperit Indus. Products, Inc. v. United States,* 18 CIT ____, 855 F. Supp. 1292 (CIT 1994), at 1299, observed:

> The Court also rejects defendant's argument that the Court should uphold Customs' classification because the agency based its classification on a reasonable interpretation of subheading 4010.91.15 [footnote omitted]. * * * Defendant's argument is meritless because it misconstrues the Court's role in Customs classification cases. In such cases, the court conducts a trial *de novo.* [citation omitted.] Although Customs' decisions enjoy a presumption of correctness, the Court's duty in reviewing classification determinations 'is to find the *correct* result * * *" *Jarvis Clark,* 2 Fed. Cir. (T) at 75, 733 F.2d at 878 (emphasis in original) (footnote omitted). *Implicit in this function is the Court's responsibility in classification cases not to exercise a deferential standard, but to exercise its own judgment as to what is the proper classification of the merchandise under review.*

Id., emphasis added.

Continuing, *Semperit* stresses that in classification cases deference to Customs' interpretation is logically incompatible with the Court's role because the standard in these cases requires the Court to reject any interpretation, *however reasonable,* that the Court determines is incorrect, and therefore, deference in the customs classification context would necessarily and improperly subvert the Court's statutorily based review authority. *Id.* at 1300 (emphasis in original). Hence, in light of the foregoing rationale in *Semperit* based on *Jarvis Clark,* holding that a deferential standard is precluded in classification cases, *a fortiori* a deferential standard in favor of the importer cannot exist.

Plaintiff's claim of a deference owed by the court to the importer's interpretation is even more tenuous in light of *Lotto U.S.A., Inc. v. United States,* 12 CIT 187, 188 (1988), which held that where the language of the TSUS provision did not provide a clear answer as to classification, and the importer's interpretation of the TSUS provision "has

nothing to recommend it over the approach taken by the government," *the government's interpretation must prevail.*

Absent a showing of legal error in the construction of the term "threaded," Customs' classification decision must be upheld. *Mita Copystar America, supra* (On cross-motions for summary judgment in a classification case where plaintiff challenged only the government's legal construction, the CAFC noted: "Customs is an expert agency and its classifications are statutorily presumed to be correct. Therefore, absent a showing of legal error in the construction of a tariff term, * * * the trial court, should uphold a Customs classification decision."). However, *cf. Goodman Manufacturing, L.P. v. United States,* 69 F.3d 505 (CAFC (1995) (in valuation dispute, absent factual issue in motion for summary judgment, "the [statutory] presumption of correctness is not relevant," and the only issue was "whether Customs' decision is based on a permissible construction of trade statutes," citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984).

In sum, the foregoing authorities clearly preclude any concept of a deferential standard of statutory construction in classification cases in favor of the importer's reasonable interpretation.

V

Plaintiff also contends that in determining whether the imports were "threaded" within the common meaning of that term, the court erred in considering descriptive nomenclature applied in the trade since there is no claim of a "commercial designation" differing from the common meaning. It is undisputed that in trade parlance the imports are not referred to as "threaded," but rather are described as "finned," "micro-finned," or "grooved."

The court agrees with plaintiff that commercial designation, as such, is not an issue in this case. Nonetheless, there are longstanding rules in classification based on common meaning, that the common and commercial meanings are presumed to be the same; that Congress is presumed to know the language of commerce and to have framed tariff acts so as to classify commodities according to the general usage and denomination of the trade; that Congress ordinarily employs terms in their commercial sense; and that Congress is presumed to know how terms are used in the trade. *See* the numerous case authorities cited in Sturm, *Customs Law and Administration,* § 52.6. Accordingly, in determining the common meaning of "threaded" as used in connection with tubes and pipes, as defined in Note 1(h), the court is not required to close its eyes to the undisputed fact that the relevant industry, including Marubeni, does not refer to, represent, describe or market the imports as "threaded" tubes.

VI

Plaintiff further argues that the court ignored the undisputed fact that the term "threads" was used to describe certain internal spiral grooving for surface roughness in a scientific article authored by mem-

bers of the faculty of the Chemical Engineering Department at Alexandria University, Alexandria, Egypt and published in the *Canadian Journal of Engineering,* cited in Slip Op. 95–168 at 12. Notwithstanding use of the English language in the Canadian scientific journal by the Egyptian writers, such journal is not accepted here as an authority for the common meaning of "threads" in the United States, as claimed by plaintiff. In any event, the court previously noted that the Egyptian writers also applied the term "threaded" to a plastic sleeve *used to connect three sections of pipe,* which coupling or attachment function is consistent with the common meaning urged by the government and accepted by the court.

VII

Plaintiff also claims that the court erred in ignoring the Congressional intent in the TSUS/HTSUS conversion process. In essence, plaintiff again argues that the new HTSUS definition in Note 1(h), Chapter 74, which supersedes the prior undefined TSUS provision, must, absent evidence of contrary Congressional intent to change the classification and rate of duty on plaintiff's merchandise, be applied by the court in such manner as not to result in an increase in the rate of duty assessed under the TSUS. Plaintiff's rationale is that the new Note 1(h) definition was simply inserted in the HTSUS in "passive acquiescence to language required by treaty," and reflects no intent to change the scope of the prior undefined provision in the TSUS. The court is unable to agree.

That changes in statutory language under the HTSUS in the classification of commodities may result in changes of classification and increases in the rate of duty is illustrated by the very recent decision of the court in *SGI v. United States,* Slip Op. 96–22 (January 19, 1996). In the *SGI* court's consideration of plaintiff's claim of the "tariff neutrality" intended by Congress in the TSUS/HTSUS conversion process, the court rejected plaintiff's contention that the HTSUS provision for various containers did not broaden or change the scope of the prior TSUS provisions for luggage. Plaintiff's reliance here on *Beloit Corp. v. United States,* Slip Op. 94–17 (Feb. 2, 1994), is misplaced. There, the court found circumstances not present here that justified a determination of no Congressional intent to change the classification of the goods.

The court quite understands the plight of importers faced with perhaps unexpected increases in duty rates resulting from changes in statutory language in the TSUS/HTSUS conversion process. Nonetheless, on the facts and circumstances of this case, the court must reject plaintiff's position that despite the definitional approach adopted under Note 1(h), the HTSUS tube and pipe provisions are simply a reenactment of the undefined TSUS provision.

VIII

Plaintiff further argues that the court erred in ignoring the time-honored rule in classification of merchandise under an *eo nomine* provision that "where a dutiable provision names an article without terms of

limitation all forms of the article are thereby included unless a contrary legislative intent otherwise appears." *Smillie & Co. v. United States*, 11 Ct. Cust. Appls. 199, 201, T.D. 38966 (1921). The rule is well-settled in determining the scope of undefined and unqualified *eo nomine* tariff classifications generally, but would be entirely misplaced here in construing either the scope of subheading 7411.10.10, HTSUS, which is subject to the tightly drawn statutory definition in Note 1(h), or the term "threaded," in such defintion, which obviously is not a tariff classification *per se*.

Note 1(h) is a definition intended to *limit*, not expand, the scope of merchandise classifiable under subheading 7411.10.10, HTSUS, and the term "threaded" is simply an *exception to the definitional limitation* of uniform wall thickness in Note 1(h). Consequently, it is apparent that the rule relied on by plaintiff for the scope of tariff classifications does not apply to determining what Congress intended by the term "threaded" in Note 1(h).

CONCLUSION

Accordingly, upon full consideration of the parties' briefs, the court finds no error or irregularity, evidentiary or otherwise, in the initial decision and plaintiff's motion for rehearing is denied. *See United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 601 F. Supp. 212 (1984).

(Slip Op. 96–25)

LEE YUEN FUNG TRADING CO., INC., PLAINTIFF *v.*
DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, DEFENDANT

Court No. 92–07–00446

(Dated January 23, 1996)

JUDGMENT

AQUILINO, *Judge:* This court's slip op. 94–36 of March 3, 1994 herein, 18 CIT ___, having granted, in part, a motion by the plaintiff for summary judgment and having remanded to the defendant entries numbered D77–00056170 and D77–00070528 for consideration of reclassification of their merchandise under HTS subheading 0902.20.00 (1990); and the defendant having now reported to the court that the aforesaid entries have been reliquidated and that duties paid have been refunded to the plaintiff; and the defendant, as a result thereof, having requested that this case be discontinued; Now, therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that this case be, and it hereby is, formally dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/1 1/26/96 Aquilino, J.	Erika Inc.	93-03-00182	9018.90.70 4.2%	9817.00.96 Duty free	Test Case, Travenol Laboratories, Inc. *v.* United States, Court No. 89-08-00469	Newark, NJ and Kennedy, New York Dialyzers from Ireland

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